No. 12591

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FAHEY, *et al.*,

Appellants (Defendants),

vs. (5421-PH)

MALLONEE, *et al.*,

Appellees (Plaintiffs).

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants (Defendants),

vs. (5678-PH)

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees (Plaintiffs).

Plaintiffs' Opposition to Stay of Payment of Attorneys' Fees and Points and Authorities in Support Thereof.

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Attorney for Appellee Long Beach Federal Savings and Loan Association, Cross-Claimant and Third Party Plaintiff.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellees (Plaintiffs).

PLAINTIFFS' OPPOSITION TO STAY OF PAYMENT OF ATTORNEYS' FEES.

Filed by:

1. The Plaintiffs, and
2. The Cross-claimants Long Beach Federal Savings and Loan Association, Opposing Defendants' Motions for Stay.

Description of the Litigation.

This litigation has thus far involved fourteen (14) proceedings in state and federal, trial and appellate courts. Such proceedings are:

In the United States District Court, Southern District of California.

(1) No. 5421-P.H., commenced May 27th, 1946.

(2) No. 5678-P.H., commenced August 22nd, 1946.

(3) No. 7989-P.H., commenced February 17th, 1948.

In the United States District Court, Northern District of California.

(4) No. 28203-G, commenced July 22nd, 1948.

In the Superior Court of the State of California in and for the County of Los Angeles.

(5) No. L.B.-C. 14492, commenced January 16th, 1948.

All of the foregoing are either consolidated into, or enjoined by, the main actions Nos. 5421-P.H. and 5678-P.H., in the Southern District Court.

In the United States Supreme Court.

(6) Fahey, *et al.*, v. Mallonee, *et al.*, 332 U. S. 245, 91 L. Ed. 2030, decided June 23, 1947.

(7) *Ex Parte* Fahey, 332 U. S. 258, 91 L. Ed. 2041, (a writ of prohibition, mandamus and/or injunction against United States District Judge Peirson M. Hall, denied in June, 1947).

In the United States Court of Appeals for the Ninth Circuit.

(8) Ammann, *et al.* v. Mallonee, *et al.*, No. 11751, dismissed February 6, 1948.

(9) Fahey, *et al. v.* Mallonee, *et al.*, No. 11867, dismissed February 25, 1948.

(10) Fahey, *et al.* v. Mallonee, *et al.,* No. 12511, presently pending appeal from preliminary injunction. Appeal taken December, 1949; record on appeal now in process of being printed.

(11) Petition by Fahey, *et al.,* for writ of prohibition, mandamus or other appropriate writ, v. United States District Judge Peirson M. Hall. Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

(12) Petition by Federal Home Loan Bank of San Francisco, *et al.,* for writ of prohibition, mandamus or other appropriate writ v. United States District Judge Peirson M. Hall. Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

(13) Fahey, *et al.* v. Ronald Walker, Special Master of the United States District Court, No. 12575, presently pending appeal from order allowing fees to Special Master, taken May 3-5, 1950.

(14) Fahey, *et al.* v. O'Melveny & Myers, *et al.,* No. 12591, presently pending appeal from order allowing attorneys' fees, taken June 20, 1950.

Exhibit 11-7-49-1, pages 14537 to 14544 of clerk's transcript, photographs of the run, depict events at the start of the litigation.

Exhibit A, page 13 of "Opposition to Appellants' Motion for Order to Disregard Designation by Appellees of Additional Portions of Record on Appeal, and Directing Transmittal of Record, Etc." filed March 28, 1950, before this Honorable Court of Appeals in the appeal No. 12511,

presently pending, is a photograph of part of the files found by the trial court, in single copies, to weigh in excess of 150 pounds as of March, 1949.

The clerk's pagination of the records transmitted to the Court of Appeals includes 19,142 typed pages, EXCLUSIVE OF REPORTER'S TRANSCRIPTS.

Explanation of Designation of Parties.

Because of the long and complicated names and the great number of parties involved in this litigation, these respondents will, for the purpose of brevity, refer to some of the various parties as follows:

United States District Court for the Southern District of California, Central Division, will hereinafter be referred to as DISTRICT COURT. (Honorable Peirson M. Hall, United States District Judge, has been a respondent before the United States Supreme Court and before the Court of Appeals for the Ninth Circuit on applications for writs of prohibition, etc., all of which have been denied.)

The original plaintiffs in the first action filed in the District Court by the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, Mallonee, *et al.*, on behalf of 16,000 depositors, will hereinafter be referred to as the PLAINTIFFS.

The third-party plaintiff and cross-claimant Long Beach Federal Savings and Loan Association (whose $26,000,000 in assets were seized by certain of appellants-defendants, and returned by order of the United States District

Court), will hereinafter be referred to as the ASSOCIATION. (When necessary to distinguish from any other associations, it will be referred to as Long Beach Association.)

The defendant and cross-claimant in interpleader, Title Service Company (trustee on approximately $12,000,000 of deeds of trust seized by appellants-defendants), will hereinafter be referred to as TITLE SERVICE.

The third-party defendant and cross-claimant in Action No. 5421-P.H. and plaintiffs in Action No. 5678-P.H., Federal Home Loan Bank of Los Angeles (whose $46,000,000 in assets were seized by, and are yet held by, appellants-defendants) will hereinafter be referred to as the LOS ANGELES BANK.

The six Association Plaintiffs in Action No. 5678-P.H., suing on behalf of approximately 172 building and loan and savings and loan associations, stockholders in the seized Los Angeles Bank, will hereinafter be referred to as WILMINGTON ASSOCIATION, COAST ASSOCIATION, etc.

The defendants-appellants Federal Home Loan Bank of San Francisco, purportedly created by the instantaneous merger, liquidation and dissolution of the Federal Home Loan Banks of Los Angeles and Portland, will hereinafter be referred to as SAN FRANCISCO BANK. The defendant Federal Home Loan Bank of Portland will hereinafter be referred to as PORTLAND BANK.

The appellants-defendant Home Loan Bank Board; the present members thereof William K. Divers,

Chairman, J. Alston Adams, member, and O. K. LaRoque, member; the Federal Savings and Loan Insurance Corporation, its trustees who are said defendants Divers, Adams, and LaRoque, said defendants Divers, etc., all individually and in all other capacities; defendant A. V. Ammann as purported conservator, individually, and in every other capacity; defendant George K. Bramley as purported deputy conservator, individually and in every other capacity; John H. Fahey, individually, as Commissioner of former Federal Home Loan Bank Board, and in all official capacities, will all hereinafter be referred to as HOME LOAN BANK BOARD, ET AL., and/or FAHEY, ET AL., and/or AMMANN, ET AL.

If reference is made to the approximately fifty borrowers who have intervened in the action to clear the titles to more than 400 homes, they will be described simply as the INTERVENORS.

The numerous other parties to the litigation will be referred to less frequently and can best be described in the place they are referred to.

COMES NOW THE RESPONDENTS-APPELLEES, Plaintiffs SHAREHOLDER MEMBERS PROTECTIVE COMMITTEE (in No. 5421-P.H. Below) and the Cross-claimant, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, and in opposition to the Motions "For Stay of Payment from the Registry of the District Court of Attorneys' Fees Awarded by Order of the District Court of June 19, 1950" to the Attorneys for the Appellees FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*, and the FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WILMINGTON (both Plaintiffs in Consolidated Case No. 5678-P.H. Below), WHICH Motions were filed by the Appellants (Defendants in Consolidated Cases No. 5421-P.H. and 5678-P.H. Below), John H. Fahey, A. V. Ammann, George K. Bramley, Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank of San Francisco, who are presently withholding the assets of the Federal Home LOAN Banks of Los Angeles and Portland, MAKE THIS SAID APPELLEES' REPLY:

The Purpose.

These Motions by the Appellants are the THIRD ATTEMPT by the Appellants to delay and to prevent counsel for Plaintiffs below from receiving any attorneys' fees for services necessarily being rendered on behalf of the classes of stockholder-shareholder members represented by the Plaintiffs in both of the consolidated class actions No. 5421-P.H. and 5678-P.H. below, brought to recover possession of all of their assets aggregating in excess of $70,000,000.00, wrongfully seized from the Appellees, Long Beach Federal Savings and Loan Association and Federal Home Loan Bank of Los Angeles. Appellant the Federal Home Loan Bank of San Francisco, is using part

of such seized assets to pay its own attorneys' fees and costs to resist the return of such wrongfully seized assets.

1. In the first attempt (1947), the Supreme Court of the United States denied these same Appellants, John H. Fahey, the Federal Home Loan Bank Commissioner (Now Board), and A. V. Ammann, leave to file a Petition for a Writ of "Mandamus and/or prohibition and/or injunction" against Judge Peirson M. Hall of the United States District Court for the Southern District of California to stay and prevent the signing and execution of his Order allowing fees on account to counsel for these responding Appellees, the Plaintiffs (in No. 5421-P.H. Below) Shareholder Member Protective Committee, and to:

> ". . . prohibit any further allowance therein, and to enjoin any payments heretofore allowed."

Mr. Justice Jackson, in denying these same Appellants' Petition therein, stated:

> "An allowance of $50,000 will hardly destroy a twenty-six million dollar association during the time it would take to prosecute an appeal."

(*Ex Parte Fahey, et al.*, 332 U. S. 258, 91 L. Ed. 2041 (June 23, 1947).)

2. In the second attempt, this Honorable United States Circuit Court of Appeals for the Ninth Circuit, denied this same Appellant's, A. V. Ammann's Motion and Application for Stay of Execution, pending appeal "From an Order dated September 2, 1947 of the District Court for the Southern District of California, allowing an interim partial allowance to counsel for the Plaintiffs (in No. 5421-P.H. Below), Mallonee, *et al.*, the Shareholder

Members Protective Committee) on account of expenses and attorneys' fees."

(*Ammann v. Mallonee, et al.,* No. 11751, U. S. Circuit Court of Appeals for the Ninth Circuit; Stay Denied December 5, 1947; Appeal dismissed February 5, 1948.)

3. IN THIS THIRD ATTEMPT, the law of the case, as previously established by the United States Supreme Court and this Honorable United States Circuit Court of Appeals, should be followed and the stay denied.

The Issues.

The Appellants again seek to raise the same already decided issues, as follows:

I. That the allowance on account of attorneys' fees to the Plaintiffs, claimants to funds which are interpled and are now on deposit in the Registry of said U. S. District Court, is beyond the power of said Court.

Said assets amounting to $14,000,000.00 were by final order of said District Court interpled into its Registry by various parties to the litigation, including appellants. Said interpled assets include funds and assets seized from Appellees Federal Home Loan Bank of Los Angeles and Long Beach Federal Savings and Loan Association by the Appellants-Defendants Ammann and Federal Home Loan Bank of San Francisco, aka the Federal Home Loan Bank of Portland, on March 29, 1946.

The assets on deposit in the Registry of said U. S. District Court at Los Angeles consist of approximately:

(a) $5,300,000.00 in face value of United States Government Bonds, plus attached uncashed interest coupons representing several hundred thousands of dollars in accrued interest thereon.

(b) Approximately $6,300,000.00 face amount of four notes executed by Defendant Ammann, an Appellant here, in favor of Federal Home Loan Bank of San Francisco, another Appellant here, who claims the Appellee Long Beach Federal Savings and Loan Association is liable therefor.

(c) Cash interpled by various parties, presently amounting to approximately $1,387,640.45 as of August 10, 1950.

A total of assets on deposit in the Registry of the U. S. District Court amounting to approximately $14,000,000.00.

II. Notwithstanding said $14,000,000.00, Appellants claim that there is no general funds in the Registry of the Court from which the Court can order said attorneys' fees paid.

III. Notwithstanding the previous decisions of the U. S. Supreme Court and of this U. S. Court of Appeals, Appellants claim they are entitled to a Stay as a matter of right pending appeal, under Rules 62(d) and 73(d), F. R. C. P.

This, in spite of the specific exception provided by Rule 62(a) that:

". . . Unless otherwise ordered by the court an interlocutory or final judgment in an action for an injunction shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal."

THESE ACTIONS ARE FOR INJUNCTIONS AND OTHER RELIEF; there are presently effective three preliminary injunctions, two final for lack of appeal, and one granted December 1, 1949, from which an appeal is now pending (U. S. Court of Appeals, Ninth Circuit, Fahey, *et al.,* and Federal Home Loan Bank of San Francisco, *et al.,* Appellants v. Mallonee, *et al.,* and Federal Home Loan Bank of Los Angeles, *et al.,* Appellees, No. 12511).

IV. Notwithstanding the previous decisions of the U. S. Supreme Court and of this U. S. Court of Appeals, Appellants claim that denial of a Stay of Execution would deprive Appellants of the benefits of their rights of appeal. The District Court found that to grant a stay is to deny due process.

V. Notwithstanding the previous decisions of the U. S. Supreme Court and of this U. S. Court of Appeals, Appellants claim that Notice of Appeal by a Government Agency or employee operates as an automatic stay, pursuant to Rule 62(e) F. R. C. P. Rule 62 F. R. C. P. specifically does not limit this appellate court (62(g) F. R. C. P.).

All these issues were decided adversely to the Appellants by this Honorable U. S. Circuit Court of Appeals when it, on December 5, 1947, in the matter of Ammann v. Mallonee, No. 11751, denied the prior Motion and Application for a Stay of Execution pending appeal from the former Order allowing attorneys' fees on account to counsel for Plaintiffs in the original action No. 5421-P.H.

See: (1) Findings of Fact, Conclusions of Law and Order for Interim Partial Allowance on Account

of Expenses and Attorneys' Fees Incurred by the Plaintiffs, the Shareholders Protective Committee Prior to March, 1947 [Copy attached hereto marked Exhibit "A"]. [Clk. Tr. pp. 3103 to 3115, incl.] Appeal No. 11751 U. S. Circuit Court of Appeals (9th), dismissed February 6, 1948.

(2) Order Denying Application for Stay of Execution of Order Allowing Attorneys' Fees and Expenses [Copy attached hereto marked Exhibit "B."] Appeal No. 11751 U. S. Circuit Court of Appeals (9th), Stay Denied December 5, 1947. [Clk. Tr. pp. 3234-3259, inc.]

WHEREFORE, THESE RESPONDENT APPELLEES RESPECTFULLY PRAY:

1. That this Honorable United States Circuit Court of Appeals for the Ninth Circuit again follow the precedent established in this case by:

(a) The Supreme Court of the United States in *Ex Parte Fahey, et al.,* 332 U. S. 258, 91 L. Ed. 2041 —June 23, 1947; and

(b) This United States Circuit Court of Appeals for the Ninth Circuit, in *Ammann v. Mallonee,* No. 11751—December 5, 1947; and

2. That this Honorable United States Court of Appeals for the Ninth Circuit deny these Appellants' Motions for Stay of Execution of the United States District Court's Order of Payment from the Registry of the District Court of the allowance on account of attorneys' fees awarded by Order of the District Court on June 19, 1950.

Pleadings.

The First Action, filed May 26, 1946, No. 5421-P.H., in the District Court of the United States, Southern District of California, entitled, Mallonee, *et al.* v. Fahey, *et al.,* is a Class action brought by the Plaintiffs, Mallonee, *et al.,* as the Shareholder Members Protective Committee on behalf of 16,000 such members. The action sought recovery of possession and title to approximately $26,000,000.00, the savings of such members. Such savings were in the form of $12,000,000.00 of deeds of trust on the homes of approximately 8,000 borrowers from said Association, and approximately $14,000,000.00 in United States Government bonds, cash, and the office premises and building of said Association. ALL OF THE DEEDS OF TRUST AND THE THOUSANDS OF HOMES SECURING THE SAME, THE GOVERNMENT BONDS, CASH AND THE ASSOCIATION'S PREMISES AND BUSINESS WERE AND NOW ARE ALL WITHIN THE COUNTY OF LOS ANGELES, WITHIN THE TERRITORY OF THE UNITED STATE'S DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. The action was an equitable and *in rem* action, seeking also an INJUNCTION to prevent the merger and dissipation of, and to recover possession of, approximately $26,000,000.00 of assets seized without notice, hearing or cause, from the solvent Long Beach Federal Savings and Loan Association, and praying for the cancellation of the appointment of an alleged conservator (Defendant A. V. Ammann), to quiet title to said assets in the said Long Beach Federal Savings and Loan Association and the true owners, the mutual members thereof, and for other declaratory and injunctive relief.

The SECOND Action, No. 5678-P.H., in the United States District Court, Southern District of California, entitled Federal Home Loan Bank of Los Angeles, Coast Federal Savings and Loan Association, *et al.,* Plaintiffs, v. Federal Home Loan Bank of Portland, sometimes known as the Federal Home Loan Bank of San Francisco, John H. Fahey, *et al.,* filed August 22, 1946, is also a CLASS action. This action sought to recover possession of, and title to, approximately $46,000,000.00 of assets owned by the stockholders of said Bank. Such assets consisted of notes, collateral securing the same, consisting of many thousands of deeds of trust, United States Government Bonds, cash, office premises and business. ALL OF WHICH AND THOUSANDS OF THE PARCELS OF REAL PROPERTY SECURING THE SAME WERE PHYSICALLY WITHIN THE TERRITORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. The action was an equitable *in rem* action brought for and on behalf of all of the 172 stockholder member associations of the Federal Home Loan Bank of Los Angeles, and prays for judgment declaring Home Loan Bank Commissioner's Orders Nos. 5082, 5083 and 5084 to be null and void and to remove all clouds or purported liens from the title to, and to enjoin interference with the assets and properties of the Federal Home Loan Bank of Los Angeles, and to replevin and quiet title to all of the converted assets of the Federal Home Loan Bank of Los Angeles (amounting to approximately $46,000,000.00 in value) summarily seized from the possession of the solvent Federal Home Loan Bank of Los Angeles on or about March 29, 1946, without prior notice, hearing or cause; and it also prays for an accounting from the Federal Home Loan

Bank of Portland and/or San Francisco, which is still withholding possession of said assets, and for other injunctive and declaratory relief.

3. Third party complaint filed July 1, 1946, by the Third Party Plaintiff, Long Beach Federal Savings and Loan Association, is likewise an equitable *in rem* action seeking the return of its property and an accounting therefor, and for INJUNCTIVE and declaratory relief to prevent the wrongful dissipation of its property, to-wit: the approximately $26,000,000.00 of assets seized without cause, notice or hearing from the possession of the duly elected officers and directors of the solvent Long Beach Federal Savings and Loan Association.

4. The Answer and Cross-Claim in INTERPLEADER of Title Service Company was filed on June 4, 1946, and thereby interplead into the Registry of this Court 174 notes and deeds of trust securing the same, all upon parcels of real property located in Southern California, which said notes and trust deeds which then had a value of approximately $800,000.00. Said cross-claim also interplead into the custody of said United States District Court, the titles to the homes of approximately 8,000 borrowers conveyed to said trustee as security for the payment of approximately $12,000,000.00 in additional notes and deeds of trust. The cross-claim sought directions from the District Court to the trustee on said $12,000,000.00 of deeds of trust as to the reconveyances or other disposition of the thousands of titles to the homes therein involved and further prayed that the Defendants-Appellants here, A. V. Ammann, Fahey, *et al.,* be ordered to deposit in the Court all moneys collected by them on said notes. This resulted in approximately $800,000.00 in cash being deposited

in the Registry of said United States District Court, and also resulted in subsequent cash deposits eventually totaling in excess of $1,500,000.00 in the Registry of said United States Court.

5. That by such summary seizure, without notice, hearing, or trial, of the $26,000,000.00 in assets, representing the savings of the members of the Long Beach Association, and the $46,000,000.00 in assets owned by the stockholders of the Los Angeles Bank, the titles to the thousands of homes conveyed to secure payment of the thousands of deeds of trust aggregating many millions of dollars, were all clouded, encumbered and impaired.

That from time to time various and numerous parties, homeowners of Southern California, have filed Petitions for INTERPLEADER and Intervention in this said litigation, and have deposited in the Registry of said United States District Court at Los Angeles, various sums in interpleader, and by Orders of said United States District Court, made from time to time, such interpleaders and interventions have been allowed and said notes and obligations released as paid off, and thereby the titles to various homes in Southern California have been cleared and the lien of said deeds of trust released from said real properties transferred by Order of Court to the monies and so deposited and remaining in the Registry of the Court.

That approximately 50 such Interpleader and Intervention Actions cleared the titles to approximately 400 of the many thousands of homes, titles to which had thus been clouded and rendered unmarketable. That by mass interpleader aggregating over $12,000,000.00 of notes, deeds of trust, government bonds, and other assets, the clouded titles to the homes of approximately 8,000 borrowers were

cleared by two orders and judgments of the United States District Court. SAID ORDERS CONTAINED IN EXCESS OF 150 PAGES OF LEGAL DESCRIPTIONS OF THE THOUSANDS OF HOMES, TITLES TO WHICH ARE CLEARED BY SAID ORDERS.

6. That on June 12, 1946, the Defendant Robert H. Wallis, filed his Answer and Cross-claim in INTERPLEADER, and deposited in the Registry of the United States District Court a $50,000.00 Cashier's Check, which said check is still on deposit in the Registry of the said United States District Court at Los Angeles.

7. That said United States District Court on January 23, 1948, after proceedings duly had therein, made its order removing defendant Ammann as Conservator and restoring possession of all of the assets, business, books, records and premises of said Long Beach Association to its duly elected officers and directors.

8. That all of the $46,000,000.00 in assets of the Plaintiffs (in 5678-P.H.), Federal Home Loan Bank of Los Angeles, and some of the assets of the Long Beach Federal Savings and Loan Association, Cross-claimant (in 5421-P.H.), are still being withheld by the Appellants Federal Home Loan Bank of San Francisco, and others.

9. That on December 1, 1949, said United States District Court, upon notice and after hearings, issued its Preliminary INJUNCTION, restraining and enjoining the various parties and others therein named or designated, from in any way interfering with, or circumventing, the jurisdiction, Orders, Judgments, etc., of said U. S. Dis-

trict Court, by participating in any attempt to litigate the same issues or any of them in any other forum, including the proposed Administrative Hearing ordered by the Defendant (Appellant here), Home Loan Bank Boards' Orders No. 2015, dated September 9, 1949, or otherwise. Said Preliminary Injunction also restrained the present appellants from coercing or attempting to inflict penalties upon appellees for refusal by appellees to violate or vacate orders or judgments of the District Court.

That the appeal from said Preliminary Injunction in this Court (No. 12511), taken by the said appellants to the present appeal, is now pending with the record on said appeal in the process of being printed.

10. That numerous and various other matters, issues and pleadings, accountings, discovery proceedings, etc., are still pending in said U. S. District Court. That among such matters is the accounting by defendant Ammann for his nearly two years of operation of the business and assets, aggregating $26,000,000.00, which he seized from said Association without notice, hearing or trial, and from the possession of which he was removed by said Order of said District Court which required such accounting to the Court.

The Facts.

> "The Federal Home Loan Administrator on May 20, 1946 without notice or hearing, appointed Ammann Conservator for the Association and he at once entered into possession." (*Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030.)

When so seized by the Appellant-Defendant, John H. Fahey, acting as the one-man Federal Home Loan Bank Administrator, through his appointee, the Appellant-Defendant, A. V. Ammann, the said Long Beach Federal Savings and Loan Association was a thriving $25,000,000.00 solvent financial institution, having an admitted surplus of approximately $1,300,000.00. Said Association had grown from $7,500.00 in 1934 to $25,000,000.00 twelve years later when it was seized in 1946. [Clk. Tr. pp. 3234 to 3260, incl., Order Denying Stay of Execution re Attorneys' Fees, Exhibit "B" attached hereto.]

In the next six days following such seizure a run of withdrawals by Shareholder Members from said Long Beach Federal Savings and Loan Association was approaching a panic [see photos of run—Exhibit 11-7-49-1, Clk. Tr. pp. 14337 to 14344, incl.] and resulted in the withdrawals of approximately $6,000,000.00 or at the rate of approximately $1,000,000.00 a business day. [Clk. Tr. pp. 3103 to 3115 at p. 3109. See Finding No. 10, in Findings of Fact, Conclusions of Law and Former Order for Interim Partial Allowance on Account of Expenses and Attorneys' Fees, etc., Exhibit "A" attached hereto.] Said run of withdrawals had aggregated a total of approximately $10,000,000.00.

This was the second in a series of such seizures by the same Defendants-Appellants, Fahey and his staff, led by

the Defendant-Appellant A. V. Ammann, who is still employed by the Defendant Home Loan Bank Board, as the Assistant Supervisor of the Home Loan Bank System.

Previously, on March 29, 1946, the Appellant John H. Fahey, acting through the Defendant-Appellant A. V. Ammann and his staff, without cause, notice or hearing, seized the admittedly solvent Federal Home Loan Bank of Los Angeles and its $46,000,000.00 of assets, including its surplus of approximately $2,000,000.00; said seizure was accomplished by the enforcement by Defendant A. V. Ammann of three purported Orders (Nos. 5082, 5083, and 5084) claimed to have been issued by the Federal Home Loan Bank Administration (composed of Defendant John H. Fahey only). By said Orders the Charter of the said Los Angeles Bank was purportedly cancelled, its assets instantaneously commingled with the assets of the Federal Home Loan Bank of Portland, which was simultaneously moved from Portland to San Francisco and its name simultaneously changed to the "Federal Home Loan Bank of San Francisco" and, also instantaneously, the terms of all directors of the said two dissolved solvent Federal Home Loan Banks of Los Angeles and Portland were terminated and a new Board of Directors ordered to be designated, subject to the approval of the Defendant John H. Fahey, and simultaneously and concurrently by said Orders, it was provided that the two sovereign States of "Nevada and Arizona shall constitute one State." [Clk. Tr. pp. 12036 to 12038, incl., Home Loan Bank Board Orders Nos. 5082, 5083 and 5084, as footnotes of the Preliminary Injunction now on appeal, Case No. 12511.]

That such summary instantaneous dissolution of the Federal Home Loan Bank of Los Angeles was without prior or other knowledge or consent of its officers, di-

reasurs, or stockholders, or any of them. That a majority of the stockholders of said Los Angeles Bank expressly voted against such dissolution. [Clk. Tr. pp. 13434 to 13437, Exhibits No. 1-27-50-54, consisting of the letters of protest from stockholders of the Federal Home Loan Bank of Los Angeles.]

Neither did the Board of Directors, nor the Executive Committee, nor the Stockholders of the Federal Home Loan Bank of Portland, consent to the assumption of the liabilities or assets of the Federal Home Loan Bank of Los Angeles, nor to the changing of the name, nor to the moving of the Federal Home Loan Bank of Portland to San Francisco. [Clk. Tr. pp. 14483 to 14491 for Exhibit S, pp. 14483 to 14491 for Exhibit SA, pp. 14491 to 14499 for Exhibit SB—Minutes of Special Meeting of Executive Committee FHLB of San Francisco, September 15-16, 1948.]

At a joint meeting of the Stockholders of the Federal Home Loan Banks of Portland and Los Angeles, held July 28, 1947, the Stockholders adopted a Resolution protesting the merger of the said Federal Home Loan Bank of Los Angeles into the smaller Federal Home Loan Bank of Portland, in spite of the opinion then rendered by the attorney for San Francisco Bank, Verne Duseabery, that such action was improper "since the question involved is a legal one which only the Courts can decide." [Clk. Tr. pp. 19433 to 19437, incl., Minutes of Annual Stockholders Meeting Federal Home Loan Bank of San Francisco, held at San Francisco, California, on July 28, 1947.]

The Congress of the United States caused an investigation of these conditions to be made. After extensive hearings, the Tenth Intermediate Report of the Select Com-

mittee to Investigate Executive Agencies—House of Representatives of Seventy-Ninth Congress, was rendered on July 25, 1946, and at page 27 thereof, recommended:

> "(1) That the Commissioner revoke the order reducing the number of districts from 12 to 11 in the Federal Home Loan Bank System.
>
> "(2) That the Commissioner take all necessary steps to reestablish a Federal Home Loan Bank of Los Angeles and a Federal Home Loan Bank of Portland, and revoke the order or orders by which the assets of these two district banks were intermingled. . . ."
>
> "(4) That the Commissioner revoke the order appointing a conservator for the Federal Savings and Loan Association of Long Beach and restore the assets and affairs of the association to its duly elected management, and render a proper accounting for the same, as expeditiously as is consistent with judicial determination of the questions at issue. . . ." [See Tenth Intermediate Report of the Select Committee to Investigate Executive Agencies, House of Representatives, Seventy-ninth Congress, Second Session, Pursuant to House Resolution 88—Investigation of Federal Home Loan Bank Administration, p. 27, July 25, 1946. Clk. Tr. p. 13898.]

That when seized without notice, hearing or trial, the Long Beach Federal Savings and Loan Association had loans secured by Deeds of Trust on the homes of 8,000 Southern California residents, on which loans there were approximately $12,000,000.00 of unpaid balances. That the Trustee, holding fee title to said parcels of Southern California realty was the Title Service Company, a cross-claimant in interpleader in said action, who by bill in the

nature of interpleader, by reference to *Lis Pendens* recorded in Los Angeles County, interplead said $12,000,000.00 worth of notes and trust deeds and the titles to said thousands of parcels of real property. [Clk. Tr. p. 3110. See Findings 13 and 14 of Findings of Fact, Conclusions of Law and Order re Expenses and Attorneys' Fees, Exhibit "A" attached hereto.]

That the United States District Court Judge hearing said litigation, allowed Petitions of Interpleader and Intervention by borrowers on notes secured by Deeds of Trust in order to enable them to secure merchantable titles to their homes and property, and to thus avoid possible demands upon them for double or multiple payment of said notes and to avoid the costs and delay of thousands of separate quiet title actions. [Clk. Tr. pp. 3110 and 3111. See Finding 15 of Findings of Fact, Conclusions of Law and Order re Expenses and Attorneys' Fees, Exhibit "A" attached hereto.]

That from June, 1946 to January 24, 1948, there were approximately fifty petitions filed for permission to intervene in this litigation by various petitioners seeking to clear the titles to their homes located within the territorial jurisdiction of the United States District Court in Southern California, which petitions affected approximately 400 parcels of real property; and pursuant to Orders of the United States District Court there was deposited in the Registry of said Court, sums in excess of $1,500,000.00 in cash, and by Orders of the United States District Court, reconveyances of titles to the respective petitioners in intervention and interpleader were made whereby the true owners of said parcels of real property acquired merchantable title, duly insurable by title insurance companies authorized by the Insurance Department of the State of California to

issue title insurance on real property within the State of California; and in lieu of the security of the deeds of trust upon such parcels of real property so released, there remained on deposit in the Registry of the United States District Court of Southern California, funds in excess of $1,500,000.00 pending final determination of this litigation by the Courts. [Clk. Tr. pp. 12077 and 12078. Finding 82, pp. 66-67 of the Preliminary Injunction with Findings, filed 12-1-49, now pending before the U. S. Circuit Court of Appeals for the 9th Circuit, Case No. 12511.]

That appeals were taken by Defendant Home Loan Bank Board and/or their agents (among the appellants here) on some six intervention matters, to this United States Ninth Circuit Court of Appeals, and said Appeals were all dismissed without hearings thereon. (Appeal Cases No. 11867, 9 C. C. A.) [Clk. Tr. pp. 12079 and 12080. See p. 69, Finding 83 of said Preliminary Injunction.]

That the Home Loan Bank Board, by its Order No. 388, adopted January 17, 1948, rescinded the prior Order No. 5254 of the Home Loan Bank Administration, and thereby revoked the appointment of the Defendant A. V. Ammann as Conservator of the Long Beach Federal Savings and Loan Association, and ordered that a certified copy of such resolution be "forthwith delivered to the above named court. . . ." Said resolution further ordered a full and complete accounting to the shareholders for all assets and liabilities of any and every nature pertaining to said association, and ordered that a copy of said accounting be filed with the United States District Court in and for the Southern District of California. [For text of Resolution see Clk. Tr. p. 4651.]

Subsequently on January 23, 1948, said United States District Court made its Order removing Defendant A. V.

Ammann as Conservator of said Long Beach Federal Savings and Loan Association, and ordering him to render a full and complete accounting. [Clk. Tr. pp. 12043 and 12044. See Finding 22 of said Preliminary Injunction.]

That Case No. 5421-P.H. filed in the United States District Court at Los Angeles on the 27th day of May, 1946, preserved the assets of said Long Beach Federal Savings and Loan Association by changing the trend of withdrawals so that in the period of approximately the next seven weeks, there were withdrawals amounting to only $2,000,000.00, at the rate of only approximately $48,000.00 per day, instead of at the rate of approximately $1,000,000.00 per day, which was the rate of withdrawals up until the date of filing this action on May 27, 1946. That notwithstanding such slowing of said run of withdrawals, it yet aggregated a total of approximately $10,000,000.00. [Clk. Tr. p. 3109. See Finding 10 of Exhibit "A" attached hereto.]

That on August 22, 1946, the Federal Home Loan Bank of Los Angeles, and stockholders of said bank, suing as a class, filed Action No. 5678-W.M. in said United States District Court at Los Angeles, seeking restoration of the assets of the Los Angeles Bank and the restoration of its duly elected officers to the possession thereof, which action was consolidated in November, 1947, with the prior filed action, No. 5421-P.H. [Clk. Tr. p. 12036. See Finding 12 of said Preliminary Injunction.]

That on or about January 23, 1948, the United States District Court for the Southern District of California, Central Division, made its Order appointing Attorney Ronald Walker, Special Master of the Court to supervise the restoration of the Long Beach Federal Savings and

Loan Association and its assets, wherever they might be located, to the possession of the duly elected officers and directors of the Long Beach Federal Savings and Loan Association, to supervise elections, to supervise the accountings by the removed Conservator (Defendant A. V. Ammann), and the said Court has since, from time to time, enlarged the powers of said Special Master to supervise the Discovery Proceedings and Examination of the books and records of the Federal Home Loan Bank of San Francisco, the present holder of the assets of the Federal Home Loan Bank of Los Angeles and Portland, and of some of the assets of the Long Beach Federal Savings and Loan Association. [Clk. Tr. pp. 4708 to 4711, Order of Reference to Special Master; pp. 7879 to 7883, Order for Preliminary Inspection—Discovery Proceedings—10-22-48; pp. 8160 to 8168, Order for Inspection—12-2-48; and pp. 13640 to 13646, Order Supplementing Orders of 10-22-48 and 12-2-48.]

That notwithstanding the prior judgments of the said United States District Court at Los Angeles against it, the Defendant, the Home Loan Bank Board, issued an Order No. 2015, on September 9, 1949, ordering the Long Beach Federal Savings and Loan Association to appear and show cause, if any it had, why the Defendant Federal Savings and Loan Insurance Corporation (the managing trustees of which are the same as the members of the Defendant Home Loan Bank Board), should not be appointed Receiver of the said Long Beach Federal Savings and Loan Association, and said hearing was, by the terms of said order, to commence in Washington, D. C., on October 25, 1949, at 10 o'clock A. M. [Clk. Tr. pp. 12047 to 12048. See Finding 24, p. 36, of said Preliminary Injunction.]

THAT THE REGULATIONS WHICH APPELLANTS CLAIM APPLY PROVIDE THAT THE APPOINTMENT OF SUCH FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR A FEDERAL ASSSOCIATION, ". . . SHALL BE FOR THE PURPOSE OF LIQUIDATION. . . ." TITLE 24, PART 148, SECTION 148.1, SUBSECTION 10, CODE OF FEDERAL REGULATIONS.

That after extensive hearings, and the introduction of both oral and documentary evidence, the District Court, on December 1, 1949, made and entered its Order of Preliminary Injunction with Findings, restraining the parties from participating in any proceedings in any forum other than in the Courts of the United States for the determination of any of the issues then pending before said United States District Court in and for the Southern District of California. The appellants here have also appealed from said Preliminary Injunction with Findings, which appeal No. 12511 is now pending in this U. S. Circuit Court of Appeals for the Ninth Circuit. [Clk. Tr. pp. 13067 to 13072. Notice of Appeal.]

That the Defendant A. V. Ammann, immediately upon seizure of the assets of the said Long Beach Federal Savings and Loan Association on May 20, 1946, commenced dealing with Federal Home Loan Bank of San Francisco, who then had possession of the assets of the Federal Home Loan Bank of Los Angeles and/or Portland. The said Federal Home Loan Bank of San Francisco loaned some $7,300,000.00 of the money and assets of the Federal Home Loan Banks of Los Angeles and Portland, of which it then had possession, to the said Defendant A. V. Ammann, and accepted as security for such loan, four notes signed by A. V. Ammann, purportedly

secured by assignment and transfer to said San Francisco Bank of approximately $14,000,000.00 of trust deeds and other assets, including Government Bonds belonging to, and the property of, the said Long Beach Federal Savings and Loan Association, possession of which was obtained by defendant Ammann when he seized the association.

On March 13, 1948, upon motions duly made and after the introduction of evidence, both oral and documentary, the said U. S. District Court, in order, among other things, to clear titles to the homes of approximately 8,000 borrowers from the Association, duly made its Order requiring deposit of certain notes, deeds of trust, U. S. Government Bonds and other collateral, held by the Federal Home Loan Bank of San Francisco (the appellant here) and pursuant to said Order there has been deposited in said Court such assets amounting to approximately $14,000,000.00 which assets still (except several thousand trust deeds to which the court has quieted title) remain on deposit in the Registry of said United States District Court at Los Angeles, awaiting disposition by further Orders, proceedings and adjudications of said Court and this Appellate Court. [Clk. Tr. p. 12065. See Finding 54, p. 54 of said Preliminary Injunction.]

That said United States District Court in making said Order, found among other things, that on March 29, 1946, the Long Beach Federal Savings and Loan Association, though not then indebted to the Federal Home Loan Bank of Los Angeles in any amount or manner whatsoever, had on deposit with said Federal Home Loan Bank of Los Angeles for safekeeping, United States Government Bonds having an approximate value of $8,300,000.00, the possession of which bonds was acquired

by the Federal Home Loan Bank of San Francisco and/or Portland, when the assets of the Federal Home Loan Bank of Los Angeles were seized on March 29, 1946, by the Defendants Fahey, Ammann, *et al.,* and simultaneously delivered into the possession of said Federal Home Loan Bank of San Francisco.

In making said Order on March 13, 1948, requiring the deposit of said notes, trust deeds, Government bonds, etc., the said District Court specifically reserved power to make all additional Orders under said Motions and its otherwise existing jurisdiction. [Clk. Tr. pp. 5209 to 5306. See Order requiring deposit in Court of collateral, filed March 13, 1948.] (No appeal was taken therefrom and said Findings and Order have now become final.)

Approximately four hundred persons, firms, associations or corporations have heretofore been served, either with summons, order to show cause, or other process of said U. S. District Court, and have appeared or defaulted therein, and that those persons, firms, associations or corporations, who have not defaulted, claim some interest of title or right to possession, or other interest in, or to, the said approximately $14,000,000.00 of assets, or some portion thereof, now remaining on deposit in the Registry of said U. S. District Court, and that the *res* involved in these equitable *in rem* class actions all lie within the territorial jurisdiction of said U. S. District Court in and for the Southern District of California. [Clk. Tr. p. 12066. See Finding 56, p. 55, of said Preliminary Injunction.]

That, in said litigation, which has continued during the past four years, various phases of said litigation have been presented to the U. S. Supreme Court and have been

the subject of various appeals and motions to this U. S. Circuit Court of Appeals for the Ninth Circuit, and there have been numerous and various hearings at which testimony has been taken and evidence, both oral and documentary, has been introduced, and that said hearings have resulted in Orders, Decrees and Judgments, which have now become final, which have contained various findings of fact.

Three appeals are now pending before this U. S. Circuit Court of Appeals for the Ninth Circuit, to-wit:

(1) Appeal No. 12511 (appeal from the Preliminary Injunction, filed December 1, 1948); and

(2) Appeal No. 12575 (appeal from the Order Allowing the Fees to Special Master); and

(3) Appeal No. 12591 (appeal from the Findings of Fact, Conclusions of Law and Judgment Allowing Interim Allowance on Account for Payment of Attorneys' Fees to O'Melveny & Myers and to W. I. Gilbert, Jr., attorneys of record, respectively, for Appellees Federal Home Loan Bank of Los Angeles, *et al.,* and Appellee First Federal Savings and Loan Association of Wilmington).

All other Findings of Fact contained in all other Orders, Decrees, Injunctions and Judgments have become final, either by expiration or lapse of time for appeal, or by appeals decided or dismissed. Such final findings are therefore now *res adjudicata* as to the matters therein decided, and are now the law of this case. That among others of such final Orders, Decrees, Injunctions and

Judgments, which have found, recognized, or affirmed, the jurisdiction of said U. S. District Court, are the following:

1. "Findings of Fact, Conclusions of Law and Order for Interim Partial Allowance on Account of Expenses and Attorneys' Fees incurred by the Plaintiffs, Shareholder Members Protective Committee, Prior to March, 1947";

(a) Decision announced by U. S. District Court April 7, 1947. [Clk. Tr. pp. 2184 to 2185.]

(b) Writ of Mandamus and/or Prohibition and/or Injunction, denied June 23, 1947 by U. S. Supreme Court. (*Ex parte Fahey, et al.,* 332 U. S. 258, 91 L. Ed. 2041.)

(c) Findings of Fact, Conclusions of Law and said Order made and entered by U. S. District Court, September 2, 1947. [Clk. Tr. pp. 3103 to 3115.]

(d) Application for Stay of Execution, denied September 30, 1947 by U. S. District Court at Los Angeles. [Clk. Tr. pp. 3234 to 3259.]

(e) Application for Stay of Execution, denied December 5, 1947, by U. S. Circuit Court of Appeals for the Ninth Circuit. (*Ammann, et al., v. Mallonee, et al.,* No. 11751, U. S. Ninth Circuit Court of Appeals.)

(f) Appeal from Findings, Conclusions of Law and said Order, dismissed February 6, 1948. (*Ammann, et al. v. Mallonee, et al.,* No. 11751, U. S. Ninth Circuit Court of Appeals.)

2. "Findings of Fact, Conclusions of Law and Order" dated January 23, 1948, removing the Defendant A. V. Ammann, as conservator, and restoring the possession of

the Association and its assets to its duly elected officers and directors of the said Long Beach Federal Savings and Loan Association. [Clk. Tr. pp. 12096 to 12109.]

3. Order requiring deposit of certain notes, deeds of trust, U. S. Government Bonds and other collateral held by the Federal Home Loan Bank of San Francisco, filed March 13, 1948, requiring among other things, the deposit into the Registry of the U. S. District Court at Los Angeles of certain notes, deeds of trust, U. S. Government Bonds and other collateral, held by the Defendant Federal Home Loan Bank of San Francisco. [Clk. Tr. pp. 12170 to 12267.]

4. "Findings of Fact, Conclusions of Law and Order," filed March 26, 1948, authorizing the delivery of excess collateral, consisting of notes and deeds and deeds of trust, by the Clerk of the U. S. District Court to the duly elected officers of the Long Beach Federal Savings and Loan Association. [Clk. Tr. pp. 12268 to 12349.]

5. "Findings of Fact, Conclusions of Law and Interlocutory Decree of Injunction," filed July 30, 1948. A judgment of interlocutory decree of injunction restraining various parties from prosecuting or maintaining other actions involving the same issues in Courts other than the U. S. District Court in and for the Southern District of California, Central Division, or Reviewing Courts thereof. [Clk. Tr. pp. 12141 to 12151.]

6. "Preliminary Injunction Enjoining Prosecution of Remanded Action and Order of Remand," filed February 2, 1949, being a preliminary injunction enjoining the further prosecution and maintenance of that certain action entitled *"Newendorp-Bradley v. Gregory, et al.,"* No. L.B.-C-14492 in the Superior Court of California, remanded to

the Superior Court of the State of California to await final determination of the prior filed actions involving the same issues, pending in the said U. S. District Court. [Clk. Tr. p. 12069. See p. 58, Finding 62, of said Preliminary Injunction.]

7. Orders Requiring deposit of notes, deeds of trust, requests for reconveyances, reconveyances and money, for Ethel A. Cameron, filed November 28, 1947, at page 4162 of Clerk's Transcript; for Clayton T. Hobba and Melba B. Hobba, filed December 2, 1947, at page 4181 of Clerk's Transcript; for Wrigley Heights, Inc., and Wrigley Heights Second, Inc., filed November 28, 1947 at page 4170 of Clerk's Transcript; from which appeals were taken (No. 11867 to the Ninth Circuit Court of Appeals), and subsequently dismissed on February 25, 1948.

That as ordered by the District court, notice was served by registered mail upon all of the stockholders of said banks, of the time set for hearing of the various motions of the Appellees, O'Melveny & Myers and Richard Fitz-Patrick, and of the Appellee W. I. Gilbert, for allowance on account of Attorneys' Fees, that no objections in writing or otherwise, were made or registered by any of the approximately 310 stockholder member associations of said Federal Home Loan Bank of Los Angeles, Portland and/or San Francisco, excepting only by these Appellants, the Federal Home Loan Bank of San Francisco (as distinct from its member stockholders) and by the defendant Federal Home Loan Bank Board and/or its agents and employees.

The Appellee claimants to said funds are not opposing the payment from said funds of the fees allowed to said attorneys for said Plaintiffs in action No. 5678-P.H. [Rep. Tr. of April 8, 1950, at pp. 870 and 871—U. S. District Judge Hall's remarks.]

It was conceded by appellants that the Attorneys for the Plaintiffs, Federal Home Loan Bank of Los Angeles, First Federal Savings and Loan Association of Wilmington, *et al.* (in Action No. 5678-P.H. Below) actually performed the work and services claimed by them to have been performed. [See Reporter's Transcript regarding stipulation between Attorney Works and Attorney Angell, 6-19-50, at the time of settling the attorney fee order, p. 63.]

The District Court has, upon numerous and various occasions, found that it had jurisdiction of said litigation and has repeatedly exercised said jurisdiction, and in numerous Orders, decrees and judgments has specifically retained the power and jurisdiction to make further additional Orders, decrees and judgments. That some of said final findings of fact, conclusions of law, judgments and orders wherein said District Court has made findings of jurisdiction and exercised such jurisdiction are, among others, as follows:

1. "Plaintiffs' proposed Findings of Fact, and Order, for Interim Partial Allowance on account of Expenses and Attorneys' Fees incurred by Plaintiffs, the Shareholder Members Protective Committee, Prior to March 1, 1947," submitted pursuant to direction in the Opinion on the U. S. District Court announced April 7, 1947, wherein Finding No. 2 stated "That the Court has jurisdiction of the persons and subject matter involved."

Which said proposed Findings were presented to and were considered by the United States Supreme Court when said United States Supreme Court refused to issue a Writ of Mandamus and/or Prohibition and/or Injunction, but instead, recognized the jurisdiction of, and remanded the matter to, said United States District Court at Los Angeles, and relegated these Appellants to the taking of an Appeal saying:

> "An allowance of $50,000 will hardly destroy a twenty-six million dollar association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals." (See *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041—June 23, 1947.)

2. "Findings of Fact, Conclusions of Law and Order for Interim Partial Allowance on Account of Expenses and Attorneys' Fees Incurred by the Plaintiffs, the Shareholder Members Protective Committee, prior to March 1947," dated September 2, 1947, wherein Finding No. 2 stated:

> "(2) The Court has jurisdiction of the persons and subject matter involved."

Said findings of jurisdiction became final on February 6, 1948, and became the law of the case when the appeal of these Appellants to this Circuit Court of Appeals for the Ninth Circuit, in the matter of A. V. Ammann, *et al.,* Appellants, v. Mallonee, *et al.,* Appellees, No. 11751, was dismissed, after the application of the same Appellants for a Stay of Execution of said Order for the payment of an Interim Allowance on Account of Attorneys' Fees had been denied on or about the 5th day of December, 1948,

by this U. S. Circuit Court of Appeals for the Ninth Circuit.

It is now the law of this case that said U. S. District Court has jurisdiction of the persons and subject matter involved.

3. "The Order that the Petition of the Shareholders be granted and that the Conservator for the Long Beach Federal Savings and Loan Association be removed and its assets returned to the directors and officers of the Association."

which was filed in the said U. S. District Court on January 23, 1948, specifically provided, among other things, that:

> ". . . the Court therefore reserves full power, both under this Order and under its otherwise *existing jurisdiction*, to make all necessary, expedient or proper additional or later Orders or Decrees of Judgment." (Emphasis added.)

There was no appeal ever taken from said Order, and the same has now become final by lapse of time.

4. "Order requiring deposits of notes, deeds of trust, requests for reconveyances, reconveyances and monies,"

resulting from various applications for intervention, by the following:

(a) Wrigley Heights, Inc., and Wrigley Heights, Second, Inc., (to clear the title to 65 parcels of real property in Southern California), (filed November 28, 1947 and December 2, 1947, respectively).

(b) Ethel A. Cameron (filed November 28, 1947).

(c) Clayton T. Hobba and Melba B. Hobba (filed December 2, 1947).

(d) Owen D. Fields and Ruby W. Fields (filed December 5, 1947).

After making Orders Permitting Intervention, in which the said U. S. District Court found:

> ". . . that pending final judgment in the within action, neither said Conservator alone, nor said Long Beach Federal Savings and Loan Association alone, nor any of the parties to this action, can, without the aid and assistance of this Court make, execute and deliver to said petitioners in intervention an effective release and discharge of the said real property described in said petition and hereinafter described, from the lien, encumbrance and obligation of said deed of trust securing said note in favor of said Long Beach Federal Savings and Loan Association; and . . ."

> ". . . That among the injuries which would flow to said borrowers and purchasers by failing to require such deposit are, pending final judgment in the within action, the (1) inability to secure a merchantable title, to the real property involved which in turn would prevent either a sale thereof or a loan thereon, or a payment and termination of interest on the present loan, and (2) a multiplicity of suits which would involve all of the issues raised or which can be raised in the instant litigation and all of the parties to the present litigation; which injury and damage is hereby found to be grave, irreparable and continuing insofar as the instant borrowers . . . are concerned."

appeals were taken by certain of the present Appellants from the above four out of approximately 50 of such orders made by the District Court during the first 20 months of said litigation. Subsequently said Appeal No. 11867, *A. V. Ammann, etc., v. Mallonee, et al.,* was, on February 25, 1948, dismissed by the said U. S. Circuit Court of Appeals for the Ninth Circuit Court, and the mandate of said Appellate Court issued.

That the said U. S. District Court has its jurisdiction over matters of interpleader and intervention and involving real property within the district of said U. S. District Court and that said orders and judgments have now become final, and are now the Law of the Case.

5. The "Order requiring deposit of certain notes, deeds of trust, U. S. Government Bonds, and other collateral held by the Federal Home Loan Bank of San Francisco."

Filed in said U. S. District Court on March 13, 1948, therein specifically found that:

> ". . . all of the assets and properties, herein described, notes, deeds of trust, U. S. Government Bonds, and other collateral, are physically within the confines and boundaries of the Southern District of California and thus physically within the *jurisdiction* of this court. . . ." (Emphasis added.)

and in the Order specifically further provided:

> ". . . The Court therefore reserves full power, both under this Order and the Order to Show Cause and the Motion which brought this proceeding to this hearing and also under its *otherwise existing jurisdiction* to make all necessary expedient or proper additional or later Orders, Decrees or Judgments." (Emphasis added.)

No appeal from said Finding and Order was ever taken and therefore said Finding of Jurisdiction and Order have become final and are now the law of this case.

6. The "Order for delivery of notes and trust deeds (excess collateral) from the Clerk of the Court to Long Beach Federal Savings and Loan Association"

which was filed in said U. S. District Court on March 26, 1948, again specifically provided at page 82 of said Order:

> ". . . The Court therefore reserves full power, both under this Order and under the Order dated March 13, 1948, and the Order to Show Cause and Motions which brought that proceedings to hearing and *also under its otherwise existing jurisdiction* to make all necessary, expedient or proper additional, or later Orders, Decrees or Judgments." (Emphasis added.)

No appeal was taken from said Order, which has now become final and now is the law of the case.

7. "Findings of Fact, Conclusions of Law and Interlocutory Decree of Injunction"

filed in said U. S. District Court on July 30, 1948, in Finding 11 thereof, specifically found:

> ". . . That said proceedings orders, activities or other matters would interfere with the interpleader jurisdiction of this Southern District Court and would impede, harass, and obstruct the execution of its process, orders and judgment, and would expose said parties to the danger of having to litigate in two separate United States District Courts in separate districts the same matters which they have already litigated for more than two years in this Southern District Court. . . ."

No appeal was taken from said Findings and Order which have now become final and are now the law of this case.

8. "Preliminary Injunction enjoining prosecution of remanded action and Order for Remand."

which was filed in said U. S. District Court on February 2nd, 1949, and that said Order specifically found on pages 16-17 thereof:

> "that it is equitable and proper that all such conflicting and contradictory claims of the litigating class plaintiffs and their derivative stockholders actions, if litigated in any court, should all be presented to, and considered by, this court *having jurisdiction in interpleader in addition to all other grounds of jurisdiction."* (Emphasis added.)

That no appeal was taken from said Findings of Fact of jurisdiction and Order and the time for appeal having now elapsed, the said Finding of Jurisdiction and Order have become final and are now the law of the case.

9. In one of the most recent orders entitled "Findings of Fact, Conclusions of Law and Order for Substitution for Parties Plaintiff"

filed in said U. S. District Court on or about April 5th, 1950, Finding No. 3 on page 3 thereof, specifically finds:

> "(3) That this court has heretofore, after extended hearings by various orders, held that it has jurisdiction of the parties and subject matter of the within litigation, from certain of which orders appeals were

> taken by the Home Loan Bank Board and/or its agents and thereafter dismissed, and upon which order, as well as said other orders so holding, the time to appeal has passed for a considerable period."

That no appeal has been taken from said "Findings of Fact, Conclusions of Law and Order," although the same is a final order as it provided on page 5 thereof:

> "This order of Substitution of parties plaintiff is a final judgment and the court expressly determines that there is no just reason for delay and expressly directs and orders the forthwith entry of this judgment of substitution of parties plaintiff."

This said "Findings of Fact, Conclusions of Law and Judgment was duly entered on April 6, 1950, in Judgment Book No. 65, page 99, Records of said U. S. District Court at Los Angeles. [Clk. Tr. pp. 19216-19220.]

That such findings of jurisdiction and Order of Substitution have therefore now become final and again establish the law of the case to be that the said U. S. District Court in and for the Southern District of California, Central Division, has had, and does have, jurisdiction of the parties and subject matter of the litigation.

That the Interim Allowance of Attorneys' Fees to said Plaintiffs' counsel in the amount of $75,000.00 is approximately one-seventh of one percent (1/7th of 1%) of the assets of said Federal Home Loan Bank of Los Angeles, when seized on March 29, 1946, and is less than one-fifteenth of one percent (1/15th of 1%) of the present

combined assets of the Federal Home Loan Bank of San Francisco and/or Los Angeles and/or Portland.

That the District Court found in awarding attorneys' fees to said plaintiffs, as follows:

> "11. That a portion of the books and records of San Francisco Bank reveal that out of the funds in the possession of the San Francisco and/or Portland Bank hereinbefore described and which funds consisted of assets of the Los Angeles Bank comingled with the funds of the Portland Bank, the said San Francisco Bank has paid, for the purpose of resisting plaintiffs' claims, the sum of approximately $100,000.00 to defray legal expenses and attorney fees in addition to indirect or other expenses not presently known." [Clk. Tr. p. 19750.]

To permit the Defendant Federal Home Loan Bank of San Francisco to use over $100,000.00 of the seized funds of Federal Home Loan Bank of Los Angeles to aid and assist it in continuing to withhold such funds from their rightful owners while at the same time permitting the Federal Home Loan Bank of San Francisco, and its co-defendant Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann, *et al.,* to delay and deprive the Plaintiffs, Federal Home Loan Bank of Los Angeles and their stockholders, of the use of even such a small proportion of their funds as one-seventh of one percent of their seized assets, in an effort to recover the possession of their seized assets, is a gross injustice and one which the said

U. S. District Court would not permit and which this Honorable U. S. Circuit Court of Appeals for the Ninth Circuit should not countenance.

The District Court also found that this litigation was commenced and is being maintained by the plaintiffs in both class actions in good faith, for the purpose of protecting and preserving the rights and interests, and recovering the assets of their respective shareholder and stockholder members. [Clk. Tr. pp. 19755-19756; Findings 16 and 17 of the said Preliminary Injunction.]

The District Court also found that due process of law and ultimate justice require a trial of, and the determination of, this entire matter on the merits, both legal and factual. That in view of the whole record, one copy of which now weighs in excess of 150 pounds, it will amount to a denial of right of counsel to compel the Plaintiffs, the said Federal Home Loan Bank of Los Angeles and their stockholders, to pay counsel fees in such litigation and, likewise, it would amount to a denial of right of counsel to compel the Plaintiffs, Federal Home Loan Bank of Los Angeles and its stockholders and their counsel, to await the final determination of all the issues of said litigation for payment of said attorneys' fees. ~~[Clk. Tr. pp. 19760-19761. Conclusion No. 7 of Findings of Fact, Conclusion of Law and Order re Allowances of Attorneys' Fees on Account, filed 6-19-50.]~~ (Clk. Tr. pg 1974 Order denying stay, filed 6-19-50)

Stay Should Be Denied.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED THAT this, the third delaying attempt of the Appellants to prevent the payment of attorneys' fees to counsel for the various Plaintiffs seeking to recover possession of assets seized from their respective clients, should also be denied as:

(1) It is the law of this case that said U. S. District Court had, and has, jurisdiction of said litigation; and

(2) The services admittedly have been rendered and performed; and

(3) Admittedly the amount of $75,000.00 is a reasonable allowance on account for the services so rendered. That the District Court, after full hearing, in the exercise of its discretion, found there was no cause or justifiable reason for delaying the payment from funds on deposit in the Court's Registry, of the attorneys' fees allowed. The Honorable Court of Appeals should likewise deny the application for stay of payments of said attorneys' fees.

"Justice delayed is Justice Denied."

Respectfully submitted,

WESTOVER & SMITH,
By WYCKOFF WESTOVER,
Attorney for Plaintiff-Appellees Mallonee, et al., Shareholder Members Protective Committee.

CHARLES K. CHAPMAN,
Attorney for Cross-Claimant Long Beach Federal Savings and Loan Association.

POINTS AND AUTHORITIES.

A. Jurisdiction.

The Said U. S. District Court Had, and Still Has, Jurisdiction of the Persons and Subject Matter Involved in Consolidated Cases Nos. 5421-P.H. and 5678-P.H.

I.

That said actions involve:

1. More than $3,000.00, to-wit: Approximately Seventy Million Dollars ($70,000,000.00) of assets, all seized and all located in California when said actions were filed, and which now amount to approximately One Hundred Twenty-five Million Dollars ($125,000,000.00) of assets; and

2. Diversity of citizenship between the plaintiffs, Mallonee, *et al.*, Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, the Plaintiffs, Federal Home Loan Bank of Los Angeles and its numerous associations, all having their home offices in California, and the Defendants Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, and the Defendants John H. Fahey, a citizen of Massachusetts, the Defendant A. V. Ammann, a citizen of Maryland, the Federal Savings and Loan Insurance Corporation, a corporation of Washington, D. C., and numerous and various other citizens of other states, all parties defendant; and

3. There are numerous and various Federal questions and interpretations of the U. S. Constitution and Federal Enactments, among others, being:

(a) The taking of property without due process of law;

(b) The constitutionality and construction and validity of "Home Owners Loan Act of 1933," 48 Stat. 128; 12 U. S. C. 1461 *et seq.;*

(c) "The Federal Home Loan Bank Act," 47 Stat. 725; 12 U. S. C. 1421, *et seq.;* 15 U. S. C. 602;

(d) "The National Housing Act," 48 Stat. 1246; 12 U. S. C. 1724, *et seq.;*

(e) "The First War Powers Act of 1941. . . ." 55 Stat. 838; 50 U. S. C. App. 601, *et seq.;* and "Executive Order No. 9070 issued February 24, 1942";

(f) "Reorganization Act of 1945," 59 Stat. 613; 5 U. S. C. 133y; and

(g) "The Rules, Regulations, Directives and Orders purportedly made and adopted pursuant to, or under, each or any of said Acts."

II.

In Rem jurisdiction pursuant to Section 1655 (former Section 118), Title 28, U. S. Code, vested in said U. S. District Court in and for the Southern District of California, Central Division at Los Angeles over both of said consolidated actions which were brought to enforce, among other things, claims to, and recovery of, real and personal property located within the territorial jurisdiction of the said U. S. District Court at Los Angeles.

III.

Interpleader Jurisdiction, pursuant to:

(a) General Law Equity practices;

(b) Rule 22, F. R. C. P.; and

(c) Sections 1335, 1397 and 2361 (former Section 41-26) of Title 28, U. S. Code;

vested in said U. S. District Court at Los Angeles, over said actions into which there has been interplead, and there now remains, approximately $14,000,000.00 of assets on deposit in the Registry of said U. S. District Court in and for the Southern District of California, Central Division at Los Angeles.

IV.

The law of this case has been established to be, that said U. S. District Court in and for the Southern District of California, Central Division at Los Angeles, has jurisdiction of the subject matter of said litigation and of the parties wherever they may be found.

A. The U. S. Supreme Court has twice recognized with approval, the jurisdiction of said U. S. District Court at Los Angeles over said litigation.

First: When it reversed the judgment of unconstitutionality of Section 5(d) of the Home Owners Loan Act of 1933, and remanded the entire proceeding "without prejudice to any other administrative or judicial proceedings which may be warranted by law. The Judgment is reversed."

Fahey, et al., v. Mallonee, et al., 332 U. S. 245; 91 L. Ed. 2030 (6-23-47).

Second: When the U. S. Supreme Court denied leave to these Appellants to file a petition for a writ of mandamus and/or prohibition and/or injunction, against Judge Peirson M. Hall of the U. S. District Court for the Southern District of California, to vacate his order allowing fees to counsel in:

Fahey, et al., v. Mallonee, et al., supra,

and to "Prohibit any further allowance therein, and to enjoin any further payments heretofore allowed."

Justice Jackson, in said opinion, stated on behalf of the U. S. Supreme Court:

> "We find nothing in this case to warrant their use. An allowance of $50,000 will hardly destroy a $26,000,000 association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs. The petition is denied."
>
> *Ex Parte Fahey,* 332 U. S. 258; 91 L. Ed. 2041.

Petitions for Writs of Mandamus and/or Prohibition and/or Injunction traditionally primarily attack and put in issue the question of jurisdiction of the trial court, and certainly had there been any question as to the jurisdiction, or extent thereof, of the said U. S. District Court, the Supreme Court would have permitted the filing of the petitions for Writ of Mandamus and/or Prohibition and/or Injunction.

B. This U. S. Court of Appeals for the Ninth Circuit has followed the precedent of the U. S. Supreme Court and has likewise recognized that the said U. S. District Court in and for the Southern District of California, Central Division at Los Angeles has had, and has, jurisdiction of the persons and subject matter involved, when it, on June 1, 1950, denied leave to these Appellants to file a Motion for a "Writ of Prohibition, Mandamus or other Appropriate Relief and for Leave to Show Cause," in the matter of United States of America, *et al.,* Petitioners, vs. Peirson M. Hall, District Judge, *et al.,*

Respondents, which was filed in this court on March 1, 1950. In said Petition for Extraordinary Writ, the Petitioners again made the wornout attack upon the jurisdiction of the trial court, and repeatedly urged lack of jurisdiction.

C. The denial by the U. S. Supreme Court and by this U. S. Circuit Court of Appeals for the Ninth Circuit, of the two applications for Writs of Mandamus and/or Prohibition and/or Injunction *"a fortiori"* are findings by the U. S. Supreme Court and this Court of Appeals that said U. S. District Court at Los Angeles did have and has jurisdiction of said litigation and the parties thereto.

D. The Law of the Case has been established by final Findings of Fact, Conclusions of Law and Orders, Judgments and Decrees that the U. S. District Court, in and for the Southern District of California, Central Division, at Los Angeles, has jurisdiction of the subject matter and the parties and has repeatedly exercised such jurisdiction in making such final Orders and Decrees. Some of the final Findings of Fact, Conclusions of Law, Orders and/or Decrees in which the jurisdiction of said U. S. District Court has been found and/or exercised, are among others:

(1) Plaintiffs' proposed Findings of Fact, etc., *re* Allowance on Account of Attorneys' Fees, which were considered by the United States Supreme Court in *Ex Parte Fahey,* 332 U. S. 258; 91 L. Ed. 2041, wherein petitions for extraordinary writs were denied June 23, 1947.

(2) Findings of Fact, etc., and Order for Allowance on Account of Expenses and Attorneys' Fees, which were presented to and considered by this U. S. Circuit Court of

Appeals for the Ninth Circuit in the matter of A. V. Ammann, *et al.*, Appellants, v. Mallonee, *et al.*, Appellees, No. 11751, wherein this Court following the precedent of the U. S. Supreme Court, recognized with approval, the jurisdiction of the U. S. District Court at Los Angeles in the above appeal, which was dismissed on February 6, 1948.

(3) The Order removing the Defendant A. V. Ammann, as Conservator of the Long Beach Federal Savings and Loan Association, made on January 23, 1948, wherein said U. S. District Court exercised its jurisdiction and restored the assets of said $26,000,000.00 institution to its duly elected officers and directors, from which said Order no appeal has ever been taken.

(4) Order made March 13, 1948, wherein said U. S. District Court granted a petition in the nature of interpleader, and exercised its jurisdiction by requiring the Defendant Federal Home Loan Bank of San Francisco, and others, to deposit into the Registry of said U. S. District Court, assets held by it amounting to approximately $14,000,000.00 in value, and from which said Order no appeal has ever been taken.

(5) Order dated March 26, 1948, wherein said U. S. District Court at Los Angeles exercised its jurisdiction and ordered its clerk to deliver from the Registry of said Court all excess collateral and to restore same to the Long Beach Federal Savings and Loan Association, from which Order no appeal has ever been taken.

(6) Findings of Fact, and Interlocutory Decree of Injunction issued June 30, 1948, wherein said U. S. District Court exercised its jurisdiction to protect its own jurisdiction from proceedings, activities or other matters which would interfere with its interpleader jurisdiction,

from which said interlocutory decree of injunction no appeal was ever taken.

IT IS THE LAW OF THIS CASE THAT the said U. S. District Court in and for the Southern District of California, has at all times had, and still has, jurisdiction of the said litigation and the parties thereto.

B. The District Court at Los Angeles, Within Whose District the Assets Were Seized, and Are Yet Situated, Has Jurisdiction to Determine Ownership and Possession of Such Assets.

The jurisdiction of the District Court *in rem,* arises under several main headings. They are set forth in detail in the Conclusions of Law, pages 72 to 78 inclusive, of the Preliminary Injunction appealed from in Appeal No. 12511. Summarized, such sources of jurisdiction are:

(1) Title 28, Section 118, U. S. C. as it existed in 1946 when the litigation was commenced, and as presently embodied in new Title 28, Section 1655. (The Lis Pendens describing the real property, homes of approximately 8,000 borrowers on $12,000,000.00 of deeds of trust seized by the defendants, was recorded among the first documents in the action.)

(2) Interpleader jurisdiction:

(a) Under the inherent equity powers of federal courts derived from equity practice at the time of the adoption of the United States Constitution;

(b) Statutory interpleader under Title 28, Section 41, Subdivision 26, as it existed at the commencement of the litigation in 1946, and as presently embodied in Title 28, Sections 1335, 1397 and 2361; and

(c) Interpleader under Rule 22 F.R.C.P.

(3) By general appearances of the defendants before the Court, by official resolutions adopted and certified. Such resolutions were by their terms to be filed with the Court and directed accountings and other proceedings to be had by and before the District Court.

(4) By the Administrative Procedure Act, see particularly Section 1009 U. S. C. A., Subdivision (a) which reads in part:

> ". . . RIGHT OF REVIEW. Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

The agency action here complained of was the seizure of title and possession of over $70,000,000.00 of real and personal property, all situated within the district of the District Court. At the time of the second attempted seizure, approximately $14,000,000.00 of assets to be seized were then physically in the registry of the District Court, as a result of the then pending litigation, and a *Lis Pendens* describing several thousand parcels of real estate conveyed as security for $12,000,000.00 of notes and deeds of trust, was all recorded in the office of the County Recorder in Los Angeles County.

(5) Section (b) of Section 1009 continues:

> "(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the ab-

sence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. . . ."

The court of competent jurisdiction over the $14,000,000.00 in the registry of the District Court at Los Angeles, the $12,000,000.00 in deeds of trust secured by thousands of parcels of real property in Los Angeles County, and over the $70,000,000.00 seized assets yet within the Southern District of California, can only be the District Court for the Southern District of California, whose jurisdiction *in rem* over such assets is the subject of the attacks made in these pending appeals before this Honorable Court of Appeals.

(6) Diversity of citizenship, federal questions, over $3,000.00 involved, are all covered in complete detail in the pleadings and will not be repeated here.

Much confusion has arisen from the efforts of the appellants-defendants to intermix immunity from suit with their argument of lack of jurisdiction in the District Court. If such appellants-defendants are, as they contend, beyond the powers of any court and immune to suit, no court could have power over them, but the lack is not of jurisdiction over the property, physically within its territory and within its registry, but it might not be able, if certain of the defendants are immune to suit, to adjudicate the rights of those defendants in the property.

For such defendants to adopt a resolution, which by its terms directs that a certified copy thereof be filed with the Court, and that an accounting be made by their subordinates to the Court, and later to claim that the same Court

is without jurisdiction to adjudicate the same accounting, is a somewhat inconsistent position to state it mildly. Immunity to suit has never existed on the part of any of the appellant-defendants in this action, but if it did, it has been completely waived by the general appearances, by an official resolution duly certified, and filed with the Court as required by the terms thereof. [For text of resolution see Clk. Tr. p. 4651.]

In *Omaha National Bank of Omaha v. Federal Reserve Bank of Kansas City, Missouri* (26 F. 2d 884 F. C. A. 8, 1928), the Court stated:

> "This suit was brought under section 118, tit. 28, USCA (Judicial Code, Section 57), by the Omaha National Bank of Omaha, Nebraska, against Federal Reserve Bank of Kansas City, Missouri, Wyoming National Bank of Casper, Wyoming, First National Bank of Cheyenne, Wyoming, and T. E. McClintock, receiver of the First National Bank of Cheyenne, Wyoming, and was dismissed on the grounds that the Court was without jurisdiction."

In reversing the lower Court's action, the Appellate Court stated:

> "Accepting the allegations as stating the true facts, we think the $60,000.00 transferred to the credit of Wyoming National Bank in the Omaha Branch bank was personal property within the Court's jurisdiction, to which plaintiff asserted an equitable claim and title, and in that respect the suit was one properly brought under Section 118. . . ."

In *Commonwealth Trust Co. v. Reconstruction Finance Corp.*, 28 Fed. Supp. 586 (W. D. Penn. 1939), a suit was

brought for the recovery of certain pig iron, allegedly wrongfully withheld, similar to the situation in the instant case, the Court stated:

> "We shall first consider the objection made to the jurisdiction of this Court. Defendant contends that as a corporation under the laws of the United States, all of whose capital is owned by the United States, and whose principal office is located in the District of Columbia, it is not suable in this district. These facts appear in the Statute creating this corporation. See 15 U. S. C. A. Sections 601, 602."
>
> "The property involved in this law-suit is located in this District. It is in the possession of the defendant through its authorized agent. The plaintiff claims he is entitled to this property. We therefore hold that the Defendant is suable in this District in an action to recover it. If we find the plaintiff is entitled to it, we may then apply the proper remedy as authorized by the new Federal Rules of Civil Procedure." Motion to dismiss was denied.
>
> *Railway Express v. Jones,* 106 F. 2d 341 (1949), 7 C. C. A.

This was a class action brought on behalf of numerous victims of a swindle in which each of the individual losses had been less than $500.00 but the total exceeded $24,000.00, and in which the Collector of Internal Revenue asserted a claim to the $24,000.00 for non-payment of Income Tax, by the claimed perpetrators of the fraud. The Railway Express Company having the $24,000.00 moved to file its bill in the nature of interpleader, but the trial

court denied the motion. The Circuit Court of Appeals reversed, and ordered the interpleader to be allowed, stating:

> "Where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to relief under this section is absolute. . . .
>
> "By proceeding under the counter-claim of the Railway Express the jurisdiction of the court will be unassailable, and the claims of all claimants may be litigated exactly the same as in a proper class suit."
>
> *U. S. v. Union Pacific and Western Union Telegraph* (160 U. S. 3, 40 L. Ed. 319, 1894).

The Supreme Court said:

> "But a suit in equity by the United States against both companies for the purpose of annulling the agreements under which the telegraph company claims rights adverse to the United States, can embrace all the matters in controversy and authorize a comprehensive decree that will terminate all disputes among the parties as to such matters." (Citing *Coosaw Min. Co. v. South Carolina,* 144 U. S. 550, 567 (36 L. Ed. 537, 543).)

Further in the opinion, the Supreme Court also said:

> "We are of the opinion that the circuit court properly adjudged that equity had jurisdiction to give full relief in respect of all matters in issue between the United States and the defendant companies."

C. When Two or More Tribunals May Each Take Jurisdiction of an Action, the Tribunal Wherein Jurisdiction First Attaches Holds It to the Exclusion of All Others Until Its Duty Is Fully Performed and the Jurisdiction Involved Is Exhausted.

Conrad v. West, 98 A. C. A. (Cal.) 125 (6-15-50) (219 P. 2d 477).

In deciding this case, wherein the owner of a dwelling house had attempted to bring an Unlawful Detainer Action after an O. P. A. action in the U. S. District Court, Southern District of California, to recover excess rent paid had been commenced, the California Appellate Court stated:

> "When a state court and a court of the United States may each take jurisdiction of an action, the tribunal where jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted." (Citing cases.)

Judgment was reversed, with instructions to the Superior Court to abate the State Court action until final decision in the Federal Court action.

In *Covell v. Heymann,* 111 U. S. 176 (1883), wherein the Plaintiff sued to replevin her personal property from the Defendant, U. S. Marshall, who held it pursuant to an execution issued by a U. S. Circuit Court against the judgment debtor, the U. S. Supreme Court, in reversing the Michigan State Supreme Court, which had held in favor of the Plainitff, stated, through Justice Matthers (at p. 182):

> "It is a principle of right and of law and, therefore, of necessity. It leaves nothing to discretion or

mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

" 'The jurisdiction of a court,' said Chief Justice Marshall, 'is not exhausted by the rendition of its judgment but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised.' Wayman v. Southard, 10 Wheat., 1."

Covell v. Heymann, supra, was cited, and its principles have been approved in *Ponzi v. Fessenden,* 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607 (1922), and most recently in *Conrad v. West,* 98 A. C. A. 125 Cal. (6-15-50).

V.

The Court first assuming and acquiring jurisdiction over the property, subject matter of the litigation, may, and should, exercise that jurisdiction to the exclusion of all other forums and may, and should, issue its restraining orders and injunctions if and when necessary to restrain the Parties from commencing, maintaining, prosecuting

or participating in any actions involving the same properties in any other forum.

Rickey Land and Cattle Company v. Miller and Lux, 218 U. S. 258 (1910);

Penn. Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850 (1934);

Cramer v. Phoenix Mutual Life Ins. Co., 91 F. 2d 141 (1937) (Certiorari denied 301 U. S. 685 (1937).

VI.

A Court of equity having interpleader jurisdiction has jurisdiction to issue all necessary and appropriate Orders and Injunctions to protect its jurisdiction, including the issuing of Injunction Orders to restrain actions in other forums.

Treinies v. Sunshine Mining Co., 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85 (1939);

Dugas v. American Surety Co., 82 F. 2d 953; affirmed in 300 U. S. 414, 81 L. Ed. 720, 57 S. Ct. 515 (1936).

In *Eagle Star & British Dominion v. Tablack,* 15 F. Supp. 933 (D .C.), So. Cal., the U. S. District Court at Los Angeles announced that it is a well established principle that in a subsequently filed interpleader action, an injunction should issue to restrain the prosecution of a prior filed admiralty action involving the same property.

VII.

The jurisdiction of a Federal Court having once attached, cannot be taken away, diminished, or interfered

with, by proceedings subsequently instituted in any other forum.

Peoples Bank of Belleville v. Winslow in re Calhoun Interpleader, 102 U. S. 101; Charles Otto 256 (1880);

Holbrook Irrigation Dist. v. Arkansas Valley Land Co., 54 F. 2d 840 (C. C. A. 10 (1931)).

VIII.

A court which had jurisdiction of an action when commenced, does not lose jurisdiction by a subsequent change of law, cutting down its jurisdiction.

Dillon v. Superior Court, 98 A. C. A. 654 (July, 1950).

IX.

The U. S. District Courts in the exercise of, and to protect their respective jurisdiction, have power to, and should when necessary, restrain the acts of Federal officers, agencies and boards.

Land v. Dollar, 330 U. S. 731 (1946).

The U. S. Maritime Commission was restrained from selling the Plaintiffs' property, to-wit: the plaintiffs' stock.

Hynes v. Grimes Packing Co., 237 U. S. 86, 93 L. Ed. 1231 (May, 1949), wherein the Secretary of the Interior was enjoined from enforcing certain restrictive provisions of the Alaskan Fishery's General Regulations until final determination of the main action in the trial courts.

Williams v. Fanning, 332 U. S. 490, 91 L. Ed. 95 (1949), wherein the Postmaster at Los Angeles was restrained from seizing the Plaintiffs' money orders.

Philadelphia Company v. Stimson, 223 U. S. 604, 56 L. Ed. 570 (1912), wherein Mr. Justice Hughes in delivering the unanimous opinion of the Court, stated:

> "First. If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded." (Citing a long list of cases, including): *U. S. v. Lee,* 106 U. S. 196.

X.

In Class Actions such as this, where the subject matter and the primary parties are within the U. S. District Court's jurisdiction, all members of all classes concerned must be bound by the decree of such U. S. District Court and, hence, if necessary, it should issue appropriate preliminary injunctions and other Orders to restrain all parties of all classes to such litigation from instituting, prosecuting, or participating in the piecemeal trial of such equitable actions in any other forum.

> *Supreme Tribe of Ben Hur v. Cauble,* 255 U. S. 356, 65 L. Ed. 673 (1921).

XI.

It is not necessary that the litigation be finally concluded before a court of equity has power to make an allowance for the attorneys' fees being incurred in pursuing, obtaining or preserving a common fund.

Numerous cases have sustained this equitable doctrine—some of which are as follows:

Sprague v. Ticonic Bank, 307 U. S. 161 (1938);

Trustees v. Greenough, 105 U. S. 527 (1881), leading case;

Cowdry v. Galveston, 93 U. S. 352 (1876);

New York Dock Co. v. Poznon, 274 U. S. 117;

Clarke v. Hot Springs Electric Light & Power Co., 65 F. 2d 612 (1932); certiorari denied 287 U. S. 619, 77 L. Ed. 537 (1932);

Carter v. American Insurance Co., 3 Peters 307 (1828);

Ruby Lee Minar Ins. v. Hammett, 53 F. 2d 149 (1931);

Warren v. Palmer, 310 U. S. 132 (1940);

Winslow v. Ferguson, 25 Cal. 2d 274 (1934);

Eggerts v. Pacific States Savings and Loan Co., 53 Cal. App. 2d 554 (Petition for hearing by Calif. Supreme Court, denied 9-21-42).

D. Justice Delayed Is Justice Denied.

Appellants are NOT entitled to a stay as a matter of right.

The appellants contend that they are entitled to a stay of payment of attorneys' fees allowed on account, "as a matter of right." The same contention was made by Appellant on the former application to this Court for a Stay of Execution of the previous allowed attorneys' fees on account. This U. S. 9th Circuit Court of Appeals there, in *Ammann et al. v. Mallonee, et al.,* No. 11751, decided said issue adversely to the Appellant when it, on

December 5, 1947, denied the former application of the Appellant for a Stay of Payment of Attorneys' Fees.

The subject matter as to Stay of Execution of Judgment pending appeal is governed by the provisions of Subdivision (d) of Rule 73 of the new F.R.C.P. which became effective on September 1, 1938, and the 1946-47 amendments thereto which became effective March 19, 1948. (See *Dickinson v. Petroleum Conversion Corporation,* 94 L. Ed. 280 (Advance Sheets), decided by the Supreme Court on January 16, 1950.)

The first sentence of Subdivision (d) of Rule 73 F.R.C.P. indicates that:

The matter of a stay on appeal is a matter of discretion with the Court to whom application is made as it provides:

> ". . . Whenever an appellant *entitled thereto* desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires . . . " (Emphasis added.)

Likewise in Subdivision (e) of Rule 73, F.R.C.P., the last sentence provides:

> ". . . After the action is so docketed, application for *leave* to file a bond *may* be made only in the appellate court . . ." (Emphasis added.)

If a stay of execution was a matter of right there would be no need for filing an application for a leave to file a bond, nor would there be any need to *present* to the court, for its approval, a bond. It is significant that in each instance the language used is permissive, not mandatory, indicating that this Appellate Court has not been

deprived of its discretionary power to either grant or deny a stay as it in its sole discretion deems equitable and just.

Likewise, the language of Rule 62, Subdivision (a), (d) and (g), when read together, is significant.

Rule 62(a) provides:

> ". . . Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, *shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal . . .*" (Emphasis added.)

THE ACTIONS HERE INVOLVED SEEK INJUNCTIONS, AMONG OTHER THINGS.

Subdivision (d) of Rule 62, F.R.C.P., specifically exempts such injunction actions from its application.

Subdivision (g) of Rule 62, F.R.C.P., provides that the power of the Appellate Court in regard to matters of stay of execution for payment under judgments are not limited by the provisions of Rule 62, F.R.C.P.

Hence, none of the provisions of Rule 62, F.R.C.P., are applicable to this present application to this Ninth Circuit Court of Appeals for a Stay of Payment of Attorneys' Fees from money on deposit in the Registry of the said U. S. District Court at Los Angeles.

This Honorable Circuit Court of Appeals has its traditional discretion as a court of equity with which it may explore the equities of both sides in granting or denying a Stay, and after satisfying itself as to those matters make

its own order, not as an automatic rubber stamp underwriting of the appellants' appeal but as determined by this Honorable Circuit Court's own judgment and discretion.

For a more complete discussion of this question see "Response of Plaintiffs, Shareholder Members Protective Committee, in opposition to Motion and Application of Appellant, A. V. Ammann, for Stay of Execution of Order for Interim Allowance on Account of Expenses and Fees, and brief in support thereof, in these Appellants' former appeal No. 11751. Points I and II (pp. 30-59, incl.)

It is significant that the cases relied upon by applicants for a stay were decided before the adoption of the present F.R.C.P., and under former statutes whose language has been substantially and significantly changed when adopted, in 1938, into F.R.C.P., Rules 62, 73 and 75.

The cases of *Goddard v. Ordway,* 94 U. S. 672 decided in 1876 and the case of *McCourt v. Singers-Bigger,* 150 Fed. 102, decided in 1906, are not in point and were distinguished in the prior application for stay of payment of attorneys' fees, which was denied. (See *Ammann, et al. v. Mallonee, et al.,* No. 11751, U. S. Circuit Court of Appeals for the Ninth Circuit, Appellees' Response, pp. 64-68).

McCourt v. Singers-Bigger (cited by appellants), 150 Fed. 102 (C. C. A. 8th, 1906).

This case is not now the law and cannot be controlling. This is demonstrated by the last sentence of the opinion which reads:

"Under the law neither the court below nor this court, during the pendency of this appeal, is empowered to execute the decree."

The Federal Rules of Civil Procedure (which completely revise the system of law in effect in 1906), expressly provide that in injunction cases, it is within the discretion of the District Court or the Court of Appeals, if any or all, or any part of any orders, judgments or decrees of either court are to be enforced or stayed during the pendency of the action or during the course of appeal.

The error in the *McCourt-Singers-Bigger* decision as applied to present laws, is not easy to discover unless this final sentence of the opinion be considered. Under the statutes as they then existed neither the District Court nor any appellate court had any power over money held by a receiver of the court which could not be suspended by the losing party by the mere filing of a supersedeas bond. No order of either court was required to effectuate or allow the bond or supersedeas. In other words, one of the litigants and not the court, had the final say over the money in the hands of the Court's receiver, at least as long as the litigant could keep appeals pending in any of the appellate courts.

But Rule 62(a) reads in part as follows:

> *"Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings* . . . Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, . . . shall not be stayed during the period after its entry and until an appeal is taken OR DURING THE PENDENCY OF AN APPEAL . . ." (Emphasis added.)

The decision of *McCourt v. Singers-Bigger* has therefore been expressly repudiated by the United States Supreme Court when it adopted the foregoing language of Rule 62(a) F.R.C.P., which has been the law since 1938.

The same applies to the case of:

Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237 (1876).

A brief quotation from the opinion of that case will disclose that the law, when the case was decided, is different than the law now. The opinion says in part, at page 672 of the U. S.:

> "A supersedeas upon the appeal of the suit in equity operates to stay the execution of the decree appealed from."

Again further on:

> "A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the Act of Congress in that behalf."

The Acts of Congress mentioned in both of these decisions have long since been repealed by the Federal Rules of Civil Procedure and those Rules do not grant a stay of orders or judgments or in an injunction suit *as a matter of right to any party. They require a direct order of the District Court or of the Court of Appeals.* The District Court has made its order denying such stay but has ordered a temporary stay until this Honorable Court of Appeals can pass on the question of whether there should be a stay pending the decision of the appeal. This Honorable Court of Appeals has overruled both *Goddard v. Ordway* and *McCourt v. Singers-Bigger* in its denial of a motion for similar stay, when on December 5, 1947, certain of these same appellants attempted to stay a prior order allowing payment of attorneys fees from funds in the registry of the District Court and the stay of such order was denied by this Honorable Court of Appeals.

See also:

In re Spier Aircraft Corporation, 137 F. 2d 736 (1943).

(Decided subsequent to the adoption of the Federal Rules of Civil Procedure, and in reference to F.R.C.P., 62(e), herein discussed, the Court stated:

"The appeal to this court did not operate as a stay of proceedings."

The U. S. Supreme Court, apparently, approved of this interpretation, as it denied the petition for certiorari in 1944 (321 U. S. 770).

XII.

Where the Judgment Is Self-executing and Does Not Require a Writ of Execution, Its Effect Can Only Be Suspended by an Affirmative Order Either of the Court Which Makes the Decree or of the Appellate Tribunal.

There is a tremendous distinction between an order of an Equity Court directing its receiver or its Clerk to dispose of certain funds in the custody of the receiver or Clerk and a money judgment against one of the parties to the proceedings, to be enforced by a levy of execution and sale of defendants property. Appellants labor under the misapprehension and tend to delude the court into the error of assuming that this is a money judgment against them to be enforced by execution. The very terms of the order itself disclose that it is but an incidental interlocutory matter necessary to the prosecution of the main litigation.

The general litigation here is over $70,000,000.00 worth of seized assets. The Court below has found that

in order to enable the plaintiffs, whose assets were thus seized, to prosecute their action for the recovery of such assets, an allowance of part of the seized assets, in this case about one-seventh of one per cent (1/7th of 1%) should be made immediately available to the plaintiffs who own the money. This is not a money judgment against appellants in any sense whatsoever. It is an administrative order of the Court to its own officer, the Clerk, authorizing the immediate return to the plaintiffs, who own the money, of a part of their own money seized from these plaintiffs by appellants. In the face of this situation, appellants contend that by the mere filing of an appeal, they suspend the power, both of the trial court of equity and this Honorable Circuit Court of Appeals to administer the funds in the hands of the Clerk and this without the consent of either court and against the express will, order and direction of the trial court. Such contention is completely untenable.

A parallel situation existed in the case of:

Hovey v. McDonald, 109 U. S. 152, 27 L. Ed. 888 (1883).

There litigation had arisen over a claim against the United States and a receiver had been appointed to collect part of the claim and hold it pending the disposition of the litigation between the claimants. The Court sustained demurrers to the bills in equity and ordered that they be dismissed. The Court also ordered the receiver to pay over the money in the receiver's hands to the prevailing parties in the litigation. An appeal was taken immediately from the Order of Dismissal, and from the order for paying over of the money. The attorneys for the prevailing party demanded of the receiver that the

money be immediately paid over. All parties went before the Judge and the receiver asked that he be instructed. The Judge told him to carry out the order of the Court. The attorneys for the losing party announced that they would immediately file any supersedeas or stay bond which the Court might fix and gave notice to the Court and the receiver before the money was paid. It is conceded that in so far as the losing parties could do so, they had taken every step possible to perfect their appeal and obtain a supersedeas or stay, except that the Court had not made a stay order.

The U. S. Supreme Court distinguishes between the types of cases which are automatically suspended by an appeal and the type of cases which require an affirmative order on the part of the trial or the appellate court before a stay is effective, and held the order to the receiver to pay over the money to be an order not subject to *execution* as it was not a judgment against the losing party. It therefore was governed by chancery or equity proceedings and its effectiveness and stay depends on rules other than the statutes.

The U. S. Supreme Court said at page 159:

> *"But this case is not within the terms of the rule. There was no decree for a specific sum of money; there was no decree at all in favor of the complainants; and no execution was applicable to, or could be issued in the case, except an execution for the costs of the defendants. The truth is, that the case is not governed by the ordinary rules that relate to a supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively.* It depends upon the effect which, according to the principles and usages of a court of equity, an

appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to a supersedeas can only be brought in by way of analogy.

"In this country the matter is usually regulated by statute or rules of court, and generally speaking an appeal, upon giving the security required by law, when security is required, suspends further proceedings and operates as a supersedeas of execution. This, as we have seen, is the case in the Circuit Courts of the United States. *But the decree itself, without further proceedings, may have an intrinsic effect which can only be suspended by an affirmative order either of the court which makes the decree, or of the appellate tribunal.*"

The Court continues on page 162:

"Applying these principles to the present case, it is clear that the force of the decree was not affected by the appeal, although it was in the power of the Special Term to have continued the injunction and to have retained the fund in its control in the hands of the receiver had it seen fit to do so." (Emphasis added.)

It is thus apparent that an order by a court of equity upon money in the hands of its receiver is not stayed *even by filing a supersedeas bond.* The stay is one which is to be obtained only by an order by either the trial or the appellate court which order is to be granted or refused in the discretion of such court. Such an order was sought from the Court below and was by that Court re-

fused. In the order making such refusal the Court below said:

> "The within litigation has been pending since May 27th, 1946; it is of an extremely complex nature; all parties to the within proceeding on the allowances of attorneys' fees have proceeded with diligence and good faith to bring the multiple claims among the numerous parties in the actions in chief to issue; at least since May 10, 1949, if not from the inception of the litigation, all parties have proceeded on the basis that no fees would be collected by counsel in whose favor the above order runs except upon court order, after adversary proceedings; the matter of the entire litigation is proceeding in one phase or another almost daily and requires the constant attention of counsel; the objections to the payment of the fees directed to be paid by the above order, were based entirely on matters of law which have heretofore been repeatedly urged upon and repeatedly rejected by this court and have been set forth in various findings, orders and judgments, reference to which is hereby made, from which judgments and orders either no appeal was taken, or the time for appeal has long since expired, or in some instances appeals were taken and later dismissed.
>
> "In view of the foregoing it appears that it would be an abuse of discretion and a denial of the right to counsel, to grant a stay of the above order, and the same is denied . . ." [Clk. Tr. p. 19741.]

After such action by the Court below, it would require a most extraordinary showing, before this Court would

wish to disturb the discretion of the Court who heard the case and is most familiar with it. A case that illustrates this principle is:

> *Cumberland Telephone and Telegraph Co. v. Louisiana Public Service Commission,* 67 L. Ed. 217, 260 U. S. 212 (1922).

The Supreme Court of the United States in considering an application for stay of execution, said:

> "But *the court which is best* and most conveniently *able to exercise the nice discretion* needed to determine this balance of convenience *is the one which has considered the case on its merits, and therefore is familiar with the record. Records in cases like this are often very voluminous. Such is the record in this case.* Without abdicating our unquestioned power to grant such an application as this, and conceding that exceptional cases may arise, we are generally inclined to refer applications of this kind to the court of three judges *who have heard the whole matter, have read the record,* and can pass on the issue without additional labor. That was the course taken by this court in Southern R. Co. v. Watts, No. 927, October Term, 1921. *Per Curiam,* decided May 29, 1922. (259 U. S. 576, 66 L. Ed. 1071, 42 Sup. Ct. Rep. 585.) A similar order will be made here . . ." (Emphasis added.)

Another case in which the United States Supreme Court refused to grant a stay where the court below had refused one, was:

> *Magnum Import Company v. Coty,* 262 U. S. 159, 67 L. Ed. 922 (1923).

The application must be made in the first instance to the trial or lower court and when determined by them (unless

discretion is abused) will not be reversed by the appellate court. In this case, the U. S. Supreme Court said:

> "When, therefore, after the petition is filed and before its submission, an application is made for a suspension of the judgment or decree of the circuit court of appeals, a heavy burden rests on the applicant.
>
> "The petition should, *in the first instance,* be made to the circuit court of appeals, which, with its complete knowledge of the cases, may, with full consideration, promptly pass on it. That court is in a position to judge, first, whether the case is one likely, under our practice, to be taken up by us on certiorari; and, second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate. It involves no disrespect to this court for the circuit court of appeals to refuse to withhold its mandate or to suspend the operation of its judgment or decree pending application for certiorari to us . . . This is a matter, however, wholly within its discretion. If it refuses, *this court requires an extraordinary showing before it will grant a stay of the decree below* pending the application for a certiorari, and even after it has granted a certiorari, it requires a clear case and decided balance of convenience before it will grant such stay . . .
>
> "Coming, now, to the circumstances presented on the inquiry before us, we find nothing to justify our granting the motion. It is clear that *the circuit court of appeals gave full consideration to a similar motion, and, with a much fuller knowledge than we can have,* denied it. As we have said, *we require very cogent reasons before we will disregard the deliberate action of that court* in such a matter." (Emphasis added.)

See also, the cases of:

Virginian Railway v. United States, 272 U. S. 658 (1926);

Rice Railway Corporations v. Lathrop, 278 U. S. 509 (1929);

Alabama v. United States, 279 U. S. 229, 73 L. Ed. 675 (1929).

An extremely strong showing of abuse of discretion is required. Let us examine what showing if any, the appellants have made on the question of abuse of discretion. They have made no factual showing either by affidavits or otherwise in the Court below or to this Honorable Circuit Court of Appeals on the question of stay below. They make no showing whatsoever that the Court below committed any abuse of discretion and this is easily understandable because the contrary is the case. If the Court below is correct in its findings (which are not attacked in any way in this motion), that a denial of these funds to plaintiffs would be a denial to them of the rights of counsel, the court below would have abused its discretion if it had granted the stay. It is conceded for the purpose of this motion by the applicant, that to have granted a stay would have been a denial of counsel to the plaintiffs. *Yet the appellants are asking this Honorable Court of Appeals to do just that.*

The denying of a Stay is within the equitable discretion of this U. S. Circuit Court of Appeals, to permit the Appellants, who have been, and are still currently, using the funds seized from the Appellees for the payment of their own attorneys' fees, even on this appeal, to further stay and deprive the Appellees of the right to use some of their own monies (approximately 1/7th of 1% of the

funds seized from them) to pay their own attorneys' fees in seeking to recover, from the Appellants, the funds so seized, is a gross injustice which the U. S. District Court would not permit, and which this Honorable U. S. 9th Circuit Court of Appeals should not countenance.

As found by the U. S. District Court after full hearing, the granting of a stay of execution may amount to a depriving of the Appellants of the right to counsel for "JUSTICE DELAYED IS JUSTICE DENIED."

Respectfully submitted,

WESTOVER & SMITH,
By WYCKOFF WESTOVER,
Attorney for Appellees Mallonee, et al., Plaintiffs Below, Shareholder's Protective Committee for 16,000 Shareholders of the Long Beach Federal Savings and Loan Association,

CHARLES K. CHAPMAN,
Attorney for Appellee Long Beach Federal Savings and Loan Association, Cross-claimant and Third Party Plaintiff.

EXHIBIT "A."

In the District Court of the United States, in and for the Southern District of California, Central Division.

Paul Mallonee, C. H. Newhouse and Winnie Bucklin, Individually, and as Representatives of a Class, suing for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, an Association organized and existing under and by virtue of the laws of the United States of America, Plaintiffs, v. John H. Fahey, Individually, John H. Fahey as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, individually and A. V. Ammann, as the purported Conservator for the Long Beach Federal Savings and Loan Association, The Long Beach Federal Savings and Loan Association, Title Service Company sued herein as John Doe One (Cross-claimant in Interpleader), R. H. Wallis, sued herein as John Doe Two (Cross-Claimant in Interpleader), *et al.,* Defendants.

"Sub Nominae" Home Investment Company of Long Beach, a corporation, Intervenor, v. Paul Mallonee, *et al.,* and John H. Fahey, *et al.,* Defendants in Intervention.

The Long Beach Federal Savings and Loan Association, Defendants and Third Party Plaintiffs, v. Federal Home Loan Bank, *et al.,* Third Party Defendants.

Robert H. Wallis, Defendant and Third Party Plaintiff, v. John H. Fahey, *et al.,* Third Party Defendants.

Title Service Company, a corporation, Defendant and Third Party Plaintiff, v. John H. Fahey, *et al.,* Third Party Defendant.

Federal Home Loan Bank of Los Angeles, etc., Third Party Defendant and Cross-Complainant, v. Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, *et al.*, Third Party Cross-Defendants. Civil File No. 5421-P.H.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR INTERIM PARTIAL ALLOWANCE ON ACCOUNT OF EXPENSES AND ATTORNEYS FEES INCURRED BY THE PLAINTIFFS, THE SHAREHOLDERS PROTECTIVE COMMITTEE, PRIOR TO MARCH, 1947. SUBMITTED PURSUANT TO DIRECTION IN THE OPINION OF THE COURT ANNOUNCED APRIL 7, 1947.

The motion of the plaintiffs, the Shareholder Members Committee, suing as representatives of the shareholder members of the Long Beach Federal Savings and Loan Association, for an interim allowance on account to reimburse the plaintiffs for their expenses and attorneys' fees incurred by them in their efforts for the protection and preservation of the funds and assets of the said association, from being merged, consolidated or commingled or otherwise lost or dissipated prior to March 1, 1947, having been previously filed with supporting exhibits and points and authorities by the plaintiffs on March 6, 1947, and this court having on said day made its order setting the 24th day of March 1947, at the hour of 10:00 o'clock A. M. in Court Room No. 3, located in the Federal Building at Los Angeles, California, as the time and place for the hearing of said motion, and the court on March 6, 1947 made its order that notice of the filing of said motion and of the time and place of the hearing thereof should be given by the plaintiffs, the Shareholders Members Protective

Committee, to all parties who have appeared in the action by service of a copy of said order upon their respective solicitors or attorneys and that the Shareholders Members Protective Committee give public notice of the filing of said motion and of the time and place of the hearing thereof by publication of the said order of this court, on or before the 12th day of March, 1947, in the following newspapers of general circulation in the County of Los Angeles, State of California, to wit:

(1) The Long Beach Independent,

(2) The Long Beach Press Telegram, and

(3) The Los Angeles Daily Journal;

And the notice of the time and place of the hearing of said motion and the publication of the said order fixing the time and place of the said hearing, having been duly given pursuant to said order and by publication as aforesaid of said order, thus giving notice to the shareholder members of the said Long Beach Federal Savings and Loan Association and affidavit of publication of said order having been filed and the plaintiffs having served and filed the affidavits of John W. Preston, former Justice of the California Supreme Court, and L. R. Martineau, Jr., Esquire, setting forth their respective expert opinions of the reasonable value of the services rendered by counsel for the plaintiffs and the matter having duly and regularly come on for hearing on the 24th day of March, 1947, at the hour of 10:00 o'clock A. M. and no person having appeared or filed any objection thereto, save and except the defendant A. V. Ammann, and the hearing of said motion having been duly and regularly continued upon the court's own motion to the 7th day of April, 1947, and the defendant A. V. Ammann having served and filed documents entitled

"Resistance to Motions" and "Supplemental Points and Authorities in Support of Resistance to Motions," and the plaintiffs, the movants herein, having duly served and filed their Closing Statement and Points and Authorities within the time allowed by the court, and the resistor, the defendant Ammann, having filed no counter affidavits denying or contravening the said affidavits or other factual documents filed by the plaintiffs, the matter came on regularly for hearing at 10:00 o'clock A. M., on the 7th day of April, 1947, and none of the shareholder members of the said Long Beach Federal Savings and Loan Association having made any objection thereto, and no other persons having made any objection to the granting of the said motion for an interim allowance on account of attorneys' fees and expenses, save and excepting only the resistor-defendants A. V. Ammann and John H. Fahey;

And there appearing Wyckoff Westover, Esquire, of the firm of Westover and Smith, attorneys for the plaintiffs; Ronald L. Walker, Esquire, Assistant United States Attorney, and Ray E. Dougherty, Esquire, Associate General Counsel of the Federal Home Loan Bank Administration, representing the resistor-defendants, A. V. Ammann and John H. Fahey; Charles K. Chapman, Esquire, appearing for the defendant and cross-complainant Long Beach Federal Savings and Loan Association; H. O. Wallace, Esquire, of the firm of Thomas and Wallace, appearing for the defendant and cross-claimant in interpleader, Title Service Company, a corporation, and Raymond Tremaine, Esquire, appearing as attorney for the defendant and cross-claimant in interpleader, Robert H. Wallis;

And the Court having offered the opportunity to any and all persons and parties in the court room to present

further or additional testimony or objection and there being none offered and the resistor-defendant, A. V. Ammann and John H. Fahey having presented no contravailing affidavits or oral or documentary evidence and the matter having been argued at length; the matter was submitted for decision.

The Court, being fully advised in the premises now finds:

FINDINGS OF FACT.

(1) that proper notice of the hearing of said motion has been duly and regularly given, both by service on counsel and by publication, and

(2) that the Court has jurisdiction of the persons and subject matter involved, and

(3) that no objections have been made by any of the shareholder members whose money and funds are here involved, and

(4) that no objection has been made by any other person or persons, excepting only, the resistor-defendants A. V. Ammann and John H. Fahey, and

(5) that the shareholder members represented by the plaintiffs the Shareholder Members Protective Committee are the actual owners of the funds and assets of the Long Beach Federal Savings and Loan Association, which is a mutual association and that they are legally and equitable entitled to use a small portion of their own funds for the protection and preservation of the corpus of the main fund which consists of the assets and funds of the Long Beach Federal Savings and Loan Association, and to prevent the merger, consolidation, or commingling of the Long Beach Federal Savings and Loan Association, and/or its

assets, with any other association or institution and to preserve the said funds and assets of said association and to prevent further runs and to protect against their further dissipation by the resistor-defendants A. V. Ammann and John H. Fahey, and to aid and assist in obtaining the ultimate return of the Long Beach Federal Savings and Loan Association and its assets, to the management of their, the shareholder members, own choice, and

(6) The plaintiffs, herein, the Shareholder Members Protective Committee are duly and regularly licensed and authorized to transact and carry on business as such in the State of California, by virtue of license No. L. A. A37621, file No. 80282 L. A. issued pursuant to Chapter 784, Statutes of 1937 of the State of California, and duly renewed on the 2nd day of January, 1947, by the Department of Investments, Division of Corporations, of the State of California, and

(7) That the defendants John H. Fahey and A. V. Ammann intended to merge or consolidate the Long Beach Federal Savings and Loan Association with other financial institutions and did intend thereby to destroy its identity and goodwill and to commingle and disperse its assets and memberships by commingling them with the assets and memberships of other financial institutions, and thus render moot the questions presented in this litigation, and

(8) That the filing and prosecution of the suit herein did protect and preserve the association and its assets and funds, in that it prevented the defendants or some of them from dissipating and breaking up the Long Beach Federal Savings and Loan Association, its membership shares and organization, by merging, consolidating, re-organizing or

uniting said association, or commingling said association's assets, membership shares, or members with other organizations, banks, corporations, associations, or institutions, which would thereby have caused an immediate and irreparable loss and damage to the plaintiffs and other shareholder members of the Long Beach Federal Savings and Loan Association, as found by the undersigned from the factual showing made before him on May 27, 1946, in a restraining order issued on said date, and

(9) That the terms of said restraining order issued on the 27th day of May, 1946, continued in full force and effect, and became a portion of the decree of the three-judge statutory court, made on September 30, 1946, which portion of said decree was not stayed in the stay order issued by the Honorable Justice Wiley Rutledge, Associate Justice of the United States Supreme Court, on October 1, 1946, and

(10) That in the six days from the date of seizure on May 20, 1946, of the said association's property by the appellant Ammann and the filing of the within suit on May 26, 1946, the run of withdrawals of money by shareholder members was approaching a panic and resulted in the withdrawals of approximately six million dollars ($6,000,000.00) or at the rate of approximately one million dollars ($1,000,000.00) a business day; that the filing of the within action on the 27th day of May, 1946 preserved the assets of said association by changing the trend of withdrawals so that in the period of approximately the next seven weeks withdrawals amounted to only two million dollars ($2,000,000.00) or at the rate of only approximately forty-eight thousand dollars ($48,000.00) per business day; that had said trend of withdrawals not been changed, said association would have been nearly or com-

pletely destroyed by the withdrawal of shareholder members, and

(11) That by long established custom and usage in real estate transactions in Southern California, and particularly in the County of Los Angeles, State of California, titles are not acceptable to purchasers, nor can real property be encumbered in regular channels, except upon the issuance of a policy of title insurance by a dependable, established title insurance company licensed under the laws of the State of California, and

(12) That loans upon real property in the State of California are not ordinarily secured by mortgages, but instead, trust deeds are used almost exclusively, by which the fee title to the property encumbered is deeded to a third party, usually a corporation, which acts as trustee with the power of foreclosure, and which trustee, upon the payment of the indebtedness, must execute a deed of reconveyance upon the request of the payee in the note which payee is referred to as the beneficiary in the deed of trust, and

(13) That said association had loans on approximately eight thousand (8,000) parcels of land in the face amount of approximately twelve million dollars ($12,000,000.00) of unpaid balances, and

(14) That the Trustee holding fee title to all of said parcels of property was and is Title Service Company, defendant, and cross-claimant in interpleader herein, and

(15) That at all times after the seizure by said Ammann of the property and records of said Association on May 20, 1946, the officials of said association refused to recognize the validity of said seizure and as a result thereof a controversy developed between said Ammann and said Association, which controversy made it impossible for said

Title Service Company to determine whether or not after payment by the debtor, a reconveyance of the fee title should be made by said Title Service Company, as such trustee, upon demand of said Ammann, or on demand of said Association; that as a result of said controversy, the undersigned District Judge has allowed petitions in intervention by borrowers on notes secured by trust deeds, in order to enable them to secure merchantable titles to the property, and to thus avoid demands upon them for double payment of said notes and to avoid the costs and delay of foreclosures, and

(16) That by the maintenance of the within suit, the plaintiffs herein and their counsel have provided a means and inducement for all of the persons having loans from said association to pay said loans and secure valid reconveyances, and also to secure policies of title insurance, which were otherwise not obtainable and without which they would have had no merchantable title to their property, and

(17) That the value of the services of the firm of attorneys Westover & Smith and their associates, in representing the plaintiffs the Shareholder Members Protective Committee up to March 1, 1947, in their endeavor to protect and preserve the said Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately sixteen thousand (16,000) shareholder members, is substantially in excess of the sum of fifty thousand dollars ($50,000.00), and

(18) That an interim allowance on account of such attorneys' fees and a partial satisfaction thereof can be made at this time without endangering the solvency of the said association; that there is on deposit now in the reg-

istry of this court funds belonging to the Long Beach Federal Savings and Loan Association in excess of eight hundred thousand dollars ($800,000.00), from which an interim partial allowance on account of such attorneys' fees for services rendered prior to March 1, 1947 can be safely made; that a reasonable amount to be allowed at this time on account of and in partial satisfaction of such attorneys' fees is the sum of Fifty thousand Dollars ($50,000.00), which is less than one-fifth of One percent of the assets of said association to-wit: Twenty-six Million Dollars ($26,000,000.00); and

(19) That the plaintiffs, the Shareholder members Protective Committee, have incurred extraordinary expenses in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets, and properties, which prior to March 1, 1947, amounted to fifteen thousand five hundred thirty and 29/100 ($15,530.29) dollars, and that said plaintiffs, the firm of Westover & Smith and their associate Daniel W. O'Donoghue, Jr., have expended the sum of one thousand five hundred thirty-four and 77/100 ($1,534.77) dollars and two hundred thirty and 07/100 ($230.07) dollars, respectively, for the protection and preservation of the Long Beach Federal Savings and Loan Association, and its assets and properties, and that they are entitled to reimbursement therefor; and

(20) That there was no objection by said petitioners or any other party to the jurisdiction of respondent District Court at any time SINCE THE ISSUANCE OF THE STAY ORDER, issued by the Honorable Justice Wiley Rutledge on October 1, 1946, until motions were made by the resistor-defendants Fahey and Ammann to the United States Supreme Court for Writ of Mandamus and/or Prohibition

and/or Injunction, which said Writ was denied by the United States Supreme Court, although there have from time to time been allowed numerous interventions and deposits in Court, after motions and notices duly served upon all necessary parties. Said interventions have been allowed on behalf of borrowers who desired to pay off their indebtedness to enable them to secure clear title to their property.

Conclusions of Law.

From the foregoing findings of fact the Court now makes and renders its conclusions of law.

That from the moneys and funds of the Long Beach Federal Savings and Loan Association now on deposit with the Clerk of this Court the plaintiffs and their counsel are entitled to be paid the following amounts of money to the following persons, to-wit:

1. To the plaintiffs the Shareholder Members Protective Committee for the extraordinary expenses which they have incurred in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties during the period prior to March 1, 1947, the sum of Fifteen Thousand Five Hundred Thirty & 29/100 ($15,530.29) Dollars.

2. To the firm of Westover & Smith, Attorneys for the plaintiffs, to reimburse them for the costs and expenses incurred by them for the period prior to March 1, 1947 in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties, the sum of One Thousand Five Hunddred Thirty-four & 77/100 ($1534.77) Dollars incurred during the same period of time and for the same purposes

by their Associate Counsel in Washington, D. C., Daniel W. O'Donoghue, Jr., Esquire;

3. To Westover & Smith, Attorneys for the plaintiffs, as an interim partial allowance on account of attorneys' fees for the professional services rendered by them and their associate, Daniel W. O'Donoghue, Jr., Esquire of Washington, D. C., in representing the Shareholder Members Protective Committee in its endeavor to protect and preserve the Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately Sixteen Thousand (16,000) shareholders and members during the period of time prior to March 1, 1947—the sum of Fifty Thousand Dollars ($50,000.00)—on account.

JUDGMENT.

It Is Hereby Ordered, Adjudged and Decreed that the plaintiffs and their counsel have Judgment for the following amounts of money payable to the following persons from the funds and assets of the Long Beach Federal Savings and Loan Association, and the Clerk of this Court Is Hereby Ordered to pay from the moneys and funds of the Long Beach Federal Savings and Loan Association now on deposit with him in this action the said following amounts of money to the following persons:

1. To the plaintiffs the Shareholder Members Protective Committee for the extraordinary expenses which they have incurred in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties during the period prior to March 1, 1947, the sum of Fifteen Thousand Five Hundred Thirty & 29/100 ($15,530.29) Dollars.

2. To the firm of Westover & Smith, Attorneys for the plaintiffs, to reimburse them for the costs and expenses incurred by them for the period prior to March 1, 1947, in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties, the sum of One Thousand Five Hundred Thirty-four & 77/100 ($1534.77) Dollars incurred during the same period of time and for the same purposes by their Associate Counsel in Washington, D. C., Daniel W. O'Donoghue, Jr., Esquire;

3. To Westover & Smith, Attorneys for the plaintiffs, as an interim partial allowance on account of attorneys' fees for the professional services rendered by them and their associate, Daniel W. O'Donoghue, Jr., Esquire, of Washington, D. C., in representing the Shareholder Members Protective Committee in its endeavor to protect and preserve the Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately Sixteen Thousand (16,000) shareholders and members during the period of time prior to March 1, 1947—the sum of Fifty Thousand Dollars ($50,000.00)—on account.

Dated at Los Angeles this 2nd day of September, 1947.

/s/ PEIRSON M. HALL,
PEIRSON M. HALL, *Judge.*

EXHIBIT "B."

In the District Court of the United States, in and for the Southern District of California, Central Division.

Paul Mallonee, C. H. Newhouse and Winnie Bucklin, Individually, and as Representatives of a Class, suing for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, an Association organized and existing under and by virtue of the laws of the United States of America, Plaintiffs, vs. John H. Fahey, Individually, John H. Fahey as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, Individually and A. V. Ammann, as the purported Conservator for the Long Beach Federal Savings and Loan Association, The Long Beach Federal Savings and Loan Association, Title Service Company, sued herein as John Doe One (Cross-Claimant in Interpleader), R. H. Wallis, sued herein as John Doe Two (Cross-Claimant in Interpleader), *et al.*, Defendants. No. 5421-PH.

ORDER DENYING APPLICATION FOR STAY OF EXECUTION OF ORDER ALLOWING ATTORNEYS FEES AND EXPENSES.

On the 10th day of September, 1947, before the undersigned United States District Judge, an oral application having been made in open Court by James M. Carter, United States Attorney, by Ronald Walker, Assistant United States Attorney and by Ray E. Daugherty, Associate General Counsel for the Home Loan Bank Board for an Order staying execution of the Order of this Court, dated September 2, 1947, allowing interim partial fees and expenses incurred prior to March 1, 1947 to the plain-

tiffs, the Shareholder Members Protective Committee and to Westover and Smith, their attorneys, said application having been made in the presence of Wyckoff Westover of Westover and Smith, attorneys for the plaintiffs; Charles K. Chapman, Attorney for the defendant, cross-claimant and third party plaintiff, Long Beach Federal Savings and Loan Association; Raymond Tremaine, Attorney for defendant and cross-claimant Robert H. Wallis; H. O. Wallace of Thomas and Wallace, Attorneys for defendant and cross-claimant Title Service Company; John Whyte of O'Melveny and Myers, Attorneys for defendant and cross-claimant Federal Home Loan Bank of Los Angeles; and

Said application for such stay of execution having been made without prior notice of motion, without supporting points and authorities, without supporting affidavits or other factual showing of any nature whatsoever; and

There having been filed on behalf of the plaintiffs and appellees the Shareholders Members Protective Committee, an affidavit and points and authorities opposing the granting of a stay of execution of said Order, allowing interim partial fees and expenses; and

The matter having been argued by counsel for such parties as desired to be heard, and the Court having considered the affidavit, points and authorities, presented by the plaintiffs and appellees, having considered the records and files in the entire proceedings, and the Court being fully advised in the premises and it appearing to the Court:

(1) That "The Federal Home Loan Administration on May 20, 1946 without notice or hearing, appointed Ammann conservator for the Association and he at once

entered into possession." (Fahey v. Mallonee, United States Supreme Court Opinion, Case No. 687, October Term, 1946.) That this litigation was commenced on May 27, 1946, by the plaintiffs, subsequently formed into and acting herein as the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, following said seizure by the defendants John H. Fahey as the Federal Home Loan Bank Commissioner and his appointee, A. V. Ammann, as the conservator for said Association, said Association having been at the date of seizure, May 20, 1946, a solvent institution having assets of approximately Twenty Six Million Dollars ($26,000,000.00) which said seizure followed by approximately two months the seizure of the solvent Forty Six Million Dollars ($46,000,000.00) Federal Home Loan Bank of Los Angeles by the defendant John H. Fahey, in which Federal Home Loan Bank said Association then had on deposit for safe-keeping government bonds alleged to exceed Five Million Dollars ($5,000,000.00) in value and in which Federal Home Loan Bank said association owned stock alleged to be in excess of Three Hundred Thousand Dollars ($300,000.00) and

(2) It further appearing that the plaintiffs were licensed by the State of California to act as such Shareholders Committee under License No. LA-A 37621 issued pursuant to Chapter 784, Statutes of 1937, of the State of California, by the Department of Investments, Division of Corporations; and that said Shareholder's Committee have been authorized in writing, by more than a majority, to wit: approximately fifty-six percent (56%) of the shareholder-members of said Long Beach Federal Savings and Loan Association to represent them; and that Westover and Smith, as the attorneys for the plaintiffs, there-

fore represent more than a majority of the shareholders in said Association; and

(3) It further appearing that considerable additional litigation was carried on by the plaintiffs in conjunction with litigation herein referred to, including the representation of said Shareholders in numerous matters of Intepleader and Interventions during the course of which there has been deposited in the registry of this Court in excess of One Million Two Hundred Thousand Dollars ($1,200,000.00) in cash; and

(4) It further appearing that no objection of any sort whatsoever has been raised to the allowance of said fee and expense money by any shareholder or depositor-member, or any other private person, entity or corporation ultimately concerned in ownership interest of the assets and funds of said association. That the only objection made to said allowance of said money and the only application for Stay of Execution of said allowance has come from appellant Ammann and the other seizing defendant, after notice as required by the Federal Rules of Civil Procedure and after wide public notice of the hearing on said application having been given on special order of court, by publication in two daily newspapers of the City of Long Beach, California, the city wherein said Association is located, and in one of the daily newspapers of the City of Los Angeles, California, the city wherein said hearing was had, and after the consideration of numerous and lengthy affidavits by lay persons and expert witnesses, and no contravailing factual matters having been presented in opposition; and

(5) It further appearing that the money from which said interim partial fees and expenses would be paid in money on deposit in the registry of this Court; and

(6) It further appearing that after said hearing and prior to the making of any formal order thereon, the defendants John H. Fahey and A. V. Ammann, did petition the Supreme Court of the United States for a Writ of Prohibition and/or Mandamus and/or Injunction to prohibit and restrain the undersigned Judge from further acting on said application for fees and expenses; and

(7) It further appearing that the Supreme Court of the United States did in an opinion filed on June 23, 1947, deny said petition for a Writ of Prohibition and/or Mandamus and/or Injunction; and

(8) It further appearing that this Court in deference to the Supreme Court of the United States, having desisted from any further proceedings until after said decision by the Supreme Court, did on September 2, 1947 make and enter its order allowing a partial interim allowance on account of attorneys fees to the firm of Westover and Smith, plaintiffs; attorneys, in the sum of Fifty Thousand Dollars ($50,000.00), and make its further order for the payment to said law firm of the sum of One Thousand Five Hundred Thirty Four and 77/100 ($1534.77) Dollars, and order the payment to the plaintiffs of the sum of Fifteen Thousand Five Hundred Thirty and 29/100 ($15,530.29) Dollars, as and for expenses incurred by them, all of such allowances relating to services and expenses incurred prior to the 1st day of March, 1947; and that a true and correct copy of said order of September 2, 1947 is for convenience, attached hereto, marked "Exhibit A," and the findings and conclusions therein are in-

corporated herein by reference with the same force and effect as though the same were herein set forth in full; and

(9) It further appearing that the defendant A. V. Ammann did on the 8th day of September, 1947, file with this Court his Notice of Motion for a Review by said statutory three-judge court of said order and for a stay of execution thereof pending such review; and

(10) It further appearing that said Motion for Review came on for hearing on the 10th day of September, 1947 and having been denied and the application for a stay of execution thereon having been requested only in the event the application for review by said three-judge Court be granted, said stay of execution fell with the denial of the application for review; and that a formal order was made and signed by the undersigned on September 10, 1947, entitled "Order Denying Application for Review by Three Judge Court Pursuant to Title 28, Section 792, U. S. C. A." a true and correct copy of which is for convenience, attached hereto, marked Exhibit "B," the findings and conclusions therein are incorporated herein by reference with the same force and effect as though the same were herein set forth in full; and

(11) It further appearing that the bulk of the litigation thus far has had to do with some of the legal and preliminary phases only thereof and that the principal factual and legal matters which may arise in or in conjunction therewith remain to be heard, and there is also to be determined the various issues raised by the respective

cross-claims and interventions, and that the litigation is presently continuing, and unless the fees and expenses heretofore allowed be paid, the plaintiffs may be deprived of their rights to pursue the litigation to an ultimate judgment on the merits; and

(12) It further appearing that the assertion of the rights and claims by the plaintiffs did require and does require that they and counsel take an active part in the litigation and the incurring of enormous expense for the preparation of pleadings (which in this case have been voluminous), multitudinous court appearances, for the preparation and printing of records and briefs on appeal, and other incidents to litigation; that it presently appears that the within action was commenced and is maintained by the plaintiffs in good faith for the avowed purpose of protecting and preserving the rights, interests, assets and properties in said association of themselves and others similarly situated, and that due process of law for ultimate justice requires a trial and determination on the legal merits, or both legal and factual if the issues are not disposed of on the legal merits alone, and that in view of the whole record and files herein it would amount to a denial of due process to compel plaintiffs to pay the expenses and counsel fees heretofore allowed or to compel plaintiffs and counsel to await the final determination of the issues of said litigation for the payment of said fees and expenses; and

(13) It further appearing that as found by the Supreme Court of the United States in their opinion filed

on June 23, 1947—(*Ex Parte* Fahey, 133 Miscellaneous, October Term, 1946), "an allowance of Fifty Thousand Dollars ($50,000.00) will hardly destroy a Twenty Six Million Dollar ($26,000,000.00) Association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs".; and said Court therein denied said petition; and

(14) It further appearing that on September 10, 1947 the appellant A. V. Ammann filed a notice of appeal wherein the order and judgment of this Court for an interim partial allowance of attorneys fees and expenses to March 1, 1947 for the plaintiffs, was appealed to the Ninth Circuit Court of Appeals and immediately thereafter the Motion on which this order is based was presented to the Court.

Now Therefore, It Is Hereby Ordered, Adjudged And Decreed as follows:

First: The application for stay of execution as to that part of the order and judgment allowing the sum of Fifteen Thousand Five Hundred Thirty and 29/100 ($15,530.29) Dollars, as expenses incurred for the period up to March 1st, 1947, by the plaintiffs, the Shareholders Members Protective Committee, is unconditionally denied.

SECOND: The application for stay of execution as to that part of the order and judgment allowing the sum of One Thousand Five Hundred Thirty Four and 77/100 ($1534.77) Dollars as expenses incurred for the period up to March 1, 1947, by the firm of Westover and Smith, attorneys for the plaintiffs, is unconditionally denied;

THIRD: The application for stay of execution as to that part of the order allowing the sum of Fifty Thousand ($50,000.00) Dollars as an interim partial allowance on account of attorneys fees for services rendered prior to March 1, 1947, to the firm of Westover and Smith, as attorneys for the plaintiffs, Shareholder Members Protective Committee, is denied upon condition that the said firm of Westover and Smith file with the Clerk of this Court a Surety Bond in a form approved by this Court, conditioned that the said firm will obey any final judgment as to the disposition of the said sum of Fifty Thousand Dollars ($50,000.00), paid pursuant to the order of this Court, and upon the filing of said bond as approved, the Clerk of this Court is ordered and directed to pay to the firm of Westover and Smith from the funds on deposit in the registry of this Court the sum of Fifty Thousand Dollars ($50,000.00).

FOURTH: Pursuant to stipulations entered into in open Court, and entered by the Clerk in the minutes of this Court, by and between James M. Carter, United States Attorney, by Ronald Walker, Assistant United States Attorney, and by Ray E. Daugherty, Associate General Counsel for the Home Loan Bank Board on the one hand,

and Wyckoff Westover, Esquire, of the firm of Westover and Smith, on the other hand;

It Is Hereby Ordered that the Clerk of said Court make such payments to the said firm of Westover and Smith of the said sum of Fifty Thousand Dollars ($50,-000.00) and to plaintiffs and said attorneys of the said sum of Seventeen Thousand Sixty-five and 06/100 Dollars ($17,065.06), only upon the occuring of either of the following events:

1. The expiration of 10 days from the date of the signature of this Order without the filing with the Clerk of this Court of notice that appellant has applied to the Ninth Circuit Court of Appeals, or to a Justice thereof, for a stay of Execution of said order; or

2. If such notice be so filed within said 10 days, then the filing with the Clerk of this Court of a Notice from the Ninth Circuit Court of Appeals, or from a Justice thereof, that application for a stay of execution made to said tribunal, or a Justice thereof, by said appellant, has been denied.

Dated at Los Angeles, California, this 30th day of September, 1947.

s/s PEIRSON M. HALL,
PEIRSON M. HALL, *Judge.*

EXHIBIT "B" OF EXHIBIT "B."

In the District Court of the United States, in and for the Southern District of California, Central Division.

Paul Mallonee, C. H. Newhouse and Winnie Bucklin, Individually, and as Representatives of a Class, suing for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, an Association organized and existing under and by virtue of the laws of the United States of America, Plaintiffs, v. John H. Fahey, Individually, John H. Fahey as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, individually and A. V. Ammann, as the purported Conservator for the Long Beach Federal Savings and Loan Association, The Long Beach Federal Savings and Loan Association, Title Service Company, sued herein as John Doe One (Cross-Claimant in Interpleader), R. H. Wallis, sued herein as John Doe Two (Cross-Claimant in Interpleader), *et al.,* Defendants. No. 5421-PH.

ORDER DENYING APPLICATION FOR REVIEW BY THREE JUDGE COURT PURSUANT TO TITLE 28, SECTION 792, U. S. C. A.

On this 10th day of September, 1947, at the hour of 10:00 o'clock a. m., before the undersigned United States District Judge, and pursuant to notice theretofore given in accordance with the terms of an order of court, the application of the defendant A. V. Ammann, as conservator of the Long Beach Federal Savings and Loan Association for review by the three judge court, heretofore convened in the above-entitled action and "findings of fact, conclusions of law and order for interim partial allowance on

account of expenses and attorneys' fees incurred by the plaintiffs, the shareholders protective committee, prior to March, 1947," made and entered in the above-entitled matter on the 2nd day of September, 1947, and for a stay of execution thereon in connection with and pending such review, both having come on for hearing on the above date and hour; and Westover & Smith appearing as attorneys for said plaintiffs, H. O. Wallace appearing as attorney for cross-claimant in interpleader, Title Service Company, Charles K. Chapman appearing as attorney for Long Beach Federal Savings and Loan Association, defendant, third party plaintiff and cross-claimant, Raymond Tremaine for cross-claimant in interpleader and defendant Robert H. Wallis, and James M. Carter, United States Attorney, and Ronald R. Walker, Assistant United States Attorney, appearing as attorneys for said defendant A. V. Ammann, as well as Ray E. Dougherty, associate general counsel Home Loan Bank Board, appearing specially; and

It appearing to the Court that the three judge statutory court, which was convened and sat in this matter on July 15 and 16, 1946, under Title 28, Section 380(a), was limited to the determination as to whether or not an interlocutory or permanent injunction suspending or restraining the enforcement, operation or execution of, or setting aside in whole or in part an act of Congress, to wit, portions of the Home Owners Loan Act of 1933 as amended, upon the ground that such act or any part thereof was repugnant to the Constitution of the United States; and

It further appearing that said Court rendered the decision granting the injunction prayed for in the said matter on the ground that Section 5(d) of said Act was re-

pugnant to the Constitution of the United States, and made and entered its judgment accordingly on the 30th day of September, 1946; and

It further appearing that thereafter an appeal was taken from said judgment of the said three judge Court directly to the Supreme Court of the United States which, on June 23, 1947, rendered its opinion holding said Section 5(d) not to be repugnant to the Constitution of the United States and ordering the judgment of said three judge court reversed; and

It further appearing pursuant to said opinion that the mandate in compliance therewith was spread in the above-entitled court on the 19th day of August 1947; and

It further appearing that the power of said three judge court was limited to a consideration of the question of constitutionality and that upon the reversal of the judgment of said three judge court by the Supreme Court and spreading of the mandate on the 19th day of August. 1947, as aforesaid terminated any and all power and jurisdiction of said three judge court; and

It further appearing that the final hearing by the said three judge or statutory court was had on July 15 and 16, 1947, and

It further appearing that the hearing upon which the said findings of fact, etc., hereinabove referred to were made, was held by the undersigned on April 7, 1947; and

It further appearing that subsequent thereto and. to wit, on April 12, 1947, the undersigned received telegraphic notice that the Supreme Court. on a petition theretofore filed by and on behalf of John H. Fahey and A. V. Ammann. prohibited. enjoined and restrained the undersigned from taking any further proceedings in connection with

the petitions for allowance of attorneys' fees and expenses theretofore filed on behalf of various parties, including the said Westover & Smith and the said plaintiffs, which telegraphic notice was subsequently followed by formal notification from the clerk of the Supreme Court to the undersigned judge; and

It further appearing that pursuant to said order of prohibition, injunction and restraint, the undersigned judge took no action in connection with the matters covered by said order of prohibition, injunction and restraint until after the decision of the Supreme Court on the 23rd day of June, 1947, denying said petition of said John H. Fahey and A. V. Ammann for a permanent order of prohibition, enjoinder and restraint and until after the spreading and filing of the mandate from the Supreme Court hereinabove referred to on August 19, 1947.

From the foregoing, it is hereby concluded by the undersigned that on the 2nd day of September, 1947, on the date of signing, making and entering the said findings of fact, etc., the said three judge court was not in existence and is not now, and that the final hearing as contemplated by Section 792 of Title 28 was had on July 15 and 16, 1946.

Now, therefore, it is hereby ordered that said application for review to the three judge court be, and it is hereby denied; and it is further hereby ordered that inasmuch as the application for stay of execution was requested only in the event the application for review to said three judge

court was granted, that said stay of execution falls with the denial of the application for review to the three judge court.

Dated: At Los Angeles, California this 10th day of September, 1947.

s/s Peirson M. Hall
Peirson M. Hall
Judge of the District Court of the United States.

Approved as to form:

_____
Charles K. Chapman
Attorney for Long Beach Federal Savings and Loan Association.

Thomas and Wallace

By _____
H. O. Wallace
Attorney for Title Service Company

Raymond Trembaine

_____
Attorney for Robert H. Wallis

O'Melveny and Myers

By _____
Pierce Works

_____
Richard Fitzpatrick
Attorneys for Federal Home Loan Bank of Los Angeles

Service of the foregoing order acknowledged this ..... day of September 1947 at ..... PM

.....

Assistant U. S. Attorney

Attorney for defendant Ammann.

Judgment entered Sep. 30 1947. Docketed Sept. 30 1947 C. O. Book 46, Page 25.

EDMUND L. SMITH,

Clerk,

By J. M. HORN

Deputy.